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# THE ALL INDIA REPORTER

1947

[Vol. 34]

DONATED  
BY

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(1910-1980)

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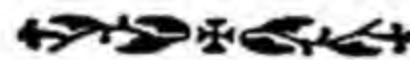
**ALLAHABAD SECTION**

WITH PARALLEL REFERENCES TO

- (1) I. L. R. 1947 ALLAHABAD      (2) 1947 ALLAHABAD LAW JOURNAL  
(3) 1947 ALLAHABAD WEEKLY REPORTER  
(4) 48 CRIMINAL LAW JOURNAL      (5) 228 TO 230 INDIAN CASES.



**CITATION : A. I. R. (34) 1947 ALLAHABAD**



**PUBLISHERS**  
**THE ALL INDIA REPORTER LTD.,**  
**NAGPUR, C. P.**

**1947**



Printed by L. Mela Ram, at the All India Reporter Press, Nagpur, and Published by  
D. V. Chitale, B.A., LL.B., Advocate, for the All India Reporter Ltd., at  
Congress Nagar, Nagpur.

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# ALLAHABAD HIGH COURT

1947

## CHIEF JUSTICES :

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" " Bidhubhusan Malik, M.A., LL.B., Bar-at-law.

## PUISNE JUDGES :

The Hon'ble Sir James Joseph Whittlesea Allsop, KT., I.C.S., J.P.  
" Rai Bahadur Tej Narain Mulla, M.A., LL.B.  
" Mr. Bidhubhusan Malik, M.A., LL.B., Bar-at-law.  
" Dr. Muhammad Wali-ullah, M.A., B.C.L., LL.D., Bar-at-law.  
" Mr. Shiva Prasad Sinha, B.A., LL.B.  
" " Orby Howell Mootham, Bar-at-law (*Edn.*).  
" Rai Bahadur Girish Prasad Mathur, B.A., LL.B.  
" Mr. Sankar Saran, M.A. (*Oxon.*), Bar-at-law.  
" " Raghubar Dayal, I.C.S.  
" " Harish Chandra, I.C.S.  
" " Prakash Narain Sapru, M.A., Bar-at-law.  
" " Choudhury Akbar Husain, I.C.S.  
" " Kailashnath Wanchoo, I.C.S.  
" Rai Bahadur Bind Basni Prasad, M.A., LL.B. (*Addl.*).

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Mr. Peary Lal Banerji, M.A., LL.B.

## CROWN COUNSEL :

Dr. M. H. Faruqi, M.A., LL.B., Ph.D., Bar-at-law, *Government Advocate.*  
Pt. Kanhya Lal Misra, B.A. (Hons.), LL.B., *Deputy Government Advocate.*  
Pt. Debi Prasad Uniyal, M.A., LL.B., *Assistant Government Advocate.*

## STANDING COUNSEL :

Mr. Mansur Alam, M.A., LL.B. (*Senior*).  
" Gopalji Mehrotra, M.A., LL.B. (*Junior*).

## ADMINISTRATOR-GENERAL & OFFICIAL TRUSTEE :

Mr. Jagdishkishore Srivastava, B.A., LL.B.

—ooo—

## REPORTER :

Mr. Sri Rama, B.A., LL.B., Advocate, Allahabad.

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ILR (1946) All 879	33 1946 AWRHC 454	1946 AWRHC 623	1947 AWRHC 83
5 1946 A L J 375	1946 AWRRev 185	and 626	90 1946 A L J 316
1946 AWRHC 577	1946 A L J 501	1946 AWRRev 245	1946 AWRHC 515
1946 AWRRev 225	231 I C 279	ILR (1946) All 771	226 I C 551
1947 OWNHC 6	34 1946 AWRHC 448	and 776	1946 AWRRev 198
ILR (1946) All 506	1947 A L J 21	231 I C 68	91 1946 AWRHC 572
229 I C 31	ILR (1946) All 725	67 1946 AWRHC 572	1946 A L J 489
7 1946 A L J 315	230 I C 385	228 I C 280	230 I C 267
1946 AWRHC 527	36 225 I C 161	1947 A L J 274	48 Cr L J 583
230 I C 76	1946 A L J 287	48 Cr L J 181	ILR (1947) All 354
8FB1946 A L J 397	1946 AWRHC 453	68 1946 A L J 391	92 1946 A L J 475
1946 AWRHC 561	1946 AWRRev 184	1946 AWRHC 553	1946 AWRHC 616
1946 AWRRev 224	ILR (1946) All 730	226 I C 418	1946 AWRRev 241
228 I C 585	37FB1946 AWRHC 569	ILR (1947) All 25	ILR (1947) All 141
ILR (1947) All 133	ILR (1946) All 732	70 1946 A L J 311	94 ILR (1946) All 837
10 1946 AWRHC 66	229 I C 561	1946 AWRHC 437	97 1946 AWRHC 574
222 I C 545	38 225 I C 122	226 I C 456	229 I C 301
1946 AWRRev 64	1946 AWRHC 418	47 Cr L J 953	48 Cr L J 376
1946 A L J 98	ILR (1946) All 711	71 1946 AWRHC 569	98 1946 A L J 479
1946 OWNHC 89	40 1946 OWNHC 211	1946 A L J 493	1946 AWRHC 618
12 225 I C 255	1946 AWRHC 415	228 I C 333	231 I C 281
1946 AWRHC 482	229 I C 268	48 Cr L J 199	ILR (1947) All 223
47 Cr L J 706	42 1946 AWRHC 466	ILR (1947) All 215	99 1946 A L J 502
ILR (1946) All 716	231 I C 288	72 1946 AWRHC 563	1946 AWRHC 631
13 225 I C 242	49 1946 AWRHC 213	1946 A L J 439	48 Cr L J 829
47 Cr L J 704	1946 AWRRev 133	230 I C 141	ILR (1947) All 240
1946 A L J 303	224 I C 290	48 Cr L J 539	104 1946 AWRHC 458
1946 AWRHC 435	50 1946 A L J 213	ILR (1947) All 385	ILR (1946) All 705
14 1946 A L J 356	1946 OWNHC 204	74FB1947 AWRHC 101	231 I C 366
1946 AWRHC 588	1946 AWRHC 383	1947 A L J 129	105 1946 AWRHC 428
230 I C 23	1946 AWRRev 172	229 I C 583	226 I C 204
16 1946 AWRHC 455	51 1946 A L J 214	ILR (1947) All 11	47 Cr L J 846
1947 A L J 157	1946 AWRHC 438	81 1946 A L J 361	1947 A L J 41
230 I C 239	228 I C 337	1946 AWRHC 549	ILR (1947) All 144
18FB1946 A L J 402	ILR (1946) All 718	231 I C 78	109 1946 AWRHC 525
1946 AWRHC 603	48 Cr L J 206	82 1946 AWRHC 522	1947 A L J 46
1946 AWRRev 236	52 1946 A L J 297	1946 AWRRev 205	229 I C 604
229 I C 123	1946 AWRHC 529	231 I C 310	48 Cr L J 425
ILR (1946) All 891	226 I C 358	83 1946 A L J 395	ILR (1947) All 160
22 1946 AWRHC 545	ILR (1947) All 311	227 I C 57	110 1947 A L J 283
1946 AWRRev 218	57 1946 A L J 310	1946 AWRHC 589	ILR (1947) All 321
1946 A L J 477	1946 AWRHC 523	ILR (1947) All 40	117 ILR (1946) All 867
230 I C 225	1946 AWRRev 206	85 227 I C 203	123 1946 A L J 495
24 1946 AWRHC 421	58 1946 A L J 367	1947 AWRHC 100	1946 AWRHC 639
230 I C 221	FB 1946 AWRHC 565	1947 A L J 282	1947 OAH C E 50



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123con	229 I C 609	170con	1946 AWRRev 242	211con	1947 AWRHC 249	302con	1947 A L J 5
	48 Cr L J 431		ILR (1947) All 225		230 I C 473		48 Cr L J 1
125	1947 A L J 204	171	1946 AWRHC 528		ILR (1947) All 180		1947 AWRHC 7
	1947 AWRHC 236		227 I C 147	214	222 I C 632		1947 OAHCB 12
127	1947 A L J 232		1947 OWNHC 11		1946 A L J 104		ILR (1947) All 287
	1947 AWRHC 200		1947 A L J 159		1946 AWRHC 476	304	1947 A L J 445
	ILR (1947) All 334	172	1946 AWRHC 576		ILR (1946) All 375		ILR (1947) All 227
136	1946 A L J 490		1947 A L J 259	225FB	1947 AWRHC 1	311	228 I C 553
	1947 OWNHC 4	173	1947 A L J 98		1947 A L J 48		1947 AWRHC 313
	1946 AWRHC 628		1947 OAHCB 20		1947 OAHCB 2	313	1947 AWRHC 110
	231 I C 275		1947 AWRHC 44		1947 OWNHC 19		1947 A L J 227
	ILR (1947) All 201		231 I C 148		230 I C 420	314	1947 A L J 144
137	ILR (1946) All 575		48 Cr L J 706		48 Cr L J 640		1947 AWRHC 179
	1947 A L J 167		ILR (1947) All 411	229	ILR (1946) A 591	317	1947 A L J 113
	1947 AWRHC 225	174	1946 A L J 354		1947 A L J 181		1947 AWRHC 128
139	1947 A L J 1		1946 AWRHC 556		1947 AWRHC 219	332	228 I C 563
	1947 AWRHC 18		227 I C 214	235	1946 AWRHC 548		1947 A L J 190
	1947 OAHCB 10		ILR (1947) All 35		1946 A L J 499		1947 AWRHC 252
	229 I C 161	176	1947 A L J 4		228 I C 169	334	1947 A L J 271
	48 Cr L J 282		1947 AWRHC 5		48 Cr L J 106		1947 AWRHC 300
	ILR (1947) All 297		1947 OAHCB 6		ILR (1947) All 155	337	1947 A L J 193
141FB	1946 AWRHC 601		1947 OWNHC 12	236	1947-15 I T R 19		1947 AWRHC 231
	1947 OWNHC 5		231 I C 364		1947 A L J 290		ILR (1947) All 44
	1946 A L J 450		ILR (1947) All 401		1947 AWRHC 355	340	1947 A L J 99
	ILR (1946) All 708	177	1946 A L J 409		ILR (1947) All 171		1947 AWRHC 94
	229 I C 527		227 I C 265	240	1946 AWRHC 97		ILR (1947) All 433
142	1947 A L J 8		1946 AWRHC 602		1946 AWRRev 77	343	229 I C 26
	1947 AWRHC 17	178	1946 A L J 500		1946 OWNHC 161		ILR (1947) All 389
	1947 OAHCB 9		228 I C 77	243	1946 AWRHC 83	345	1947 OWNHC 15
	229 I C 296		1947 OWNHC 10	244	1947 AWRHC 14		228 I C 448
	48 Cr L J 371		1946 AWRHC 629		ILR (1946) All 586		1947 AWRHC 75
	ILR (1947) All 293		ILR (1947) All 221		1947 AWRRev 24		1947 AWRRev 34
143	1947 A L J 31	179	1946 A L J 215	245	I L R 1946 A 483		ILR (1946) A 850
	1947 AWRHC 85		1946 AWRHC 421		228 I C 341	348	1947 A L J 34
	ILR (1946) All 843		ILR (1947) All 8	249	1946 AWRHC 543		1947 AWRHC 62
147	ILR (1947) All 186	180	1946 A L J 410		1946 AWRRev 217		1947 OAHCB 38
149	1947 A L J 27		1946 AWRHC 596	250	1946 A L J 308		ILR (1947) All 277
	1947 OAHCB 32		228 I C 72		1946 AWRHC 433	352	229 I C 47
	1947 AWRHC 56	181	227 I C 626		228 I C 155		ILR (1946) A 856
	230 I C 327		1947 A L J 23		48 Cr L J 91	357	1947 A L J 297
	48 Cr L J 617		1947 AWRHC 27	252	1946 AWRHC 593		1947 AWRHC 323
	ILR (1947) All 256		1947-15 I T R 51	255	1946 AWRHC 518		ILR (1947) All 415
153	1947 A L J 199		ILR (1946) All 719		1946 AWRRev 201	361FB	1947 A L J 337
	1947-15 I T R 224	184	228 I C 56	256	228 I C 493	366	1947 AWRHC 278
	1947 AWRHC 233		1947 A L J 152		I L R 1946 A 633		1948 A L J 144
	231 I C 115		1947 AWRHC 197		1947 A L J 170	368	1947 A L J 457
	ILR (1947) All 49	187	1946 AWRHC 452		1947 AWRHC 214		1947 AWRHC 305
155	1947-15 I T R 1		1946 AWRRev 183	261	I L R 1946 A 661	370	1947 AWRHC 280
	ILR (1947) All 167		1946 A L J 394		1947 A L J 322		1947-15 I T R 450
157	1947 A L J 10		226 I C 424		1947 AWRHC 370		1948 A L J 6
	1947 AWRHC 20		ILR (1946) All 709	275	228 I C 132	372	1947 A L J 82
161	1946 A L J 411	188	1946 A L J 385		ILR (1946) A 536		1947 AWRHC 91
	1946 AWRHC 597		1946 AWRHC 583		1947 A L J 160		ILR (1947) All 209
	ILR (1946) All 649		1946 AWRRev 231		1947 AWRHC 186	374	1947 A L J 64
165	1947 AWRHC 59		228 I C 242	281	...		1947 AWRHC 78
	1947 OAHCB 35		ILR (1946) All 733	288	1947 A L J 430		1947 AWRRev 37
	1947 A L J 248	190FB	1946 AWRHC 575		ILR (1947) A 403	375	1947 A L J 14
	230 I C 321		1947 OWNHC 5	293	1947 A L J 245		1947 AWRHC 32
	48 Cr L J 611		231 I C 142		1947 AWRHC 258		ILR (1947) All 263
	ILR (1947) All 370		ILR (1947) All 7	295	1947 A L J 243	382	1947 A L J 406
168	1946 A L J 497	191FB	1947 A L J 52		1947 AWRHC 256		1947 AWRHC 307
	1946 AWRHC 630		1947 OAHCB 22	296	1947 A L J 202	383	1947 A L J 408
	ILR (1947) All 218		1947 AWRHC 46		1947 AWRHC 229		1947 AWRHC 318
169	1947 A L J 3		231 I C 98	297	1947 A L J 206	388	1947 A L J 71
	1947 AWRHC 4		48 Cr L J 691		1947 AWRHC 170		1947 AWRHC 80
	1947 OAHCB 5	199	1946 AWRHC 450	299	1947 A L J 40		1947 AWRRev 39
	1947 OWNHC 24		1946 AWRRev 181		1947 AWRHC 81	390	1947 A L J 79
	231 I C 82		226 I C 440		1947 AWRRev 40		1947 AWRHC 89
	48 Cr L J 672		ILR (1946) All 532	301	1947 A L J 73		ILR (1947) All 191
	ILR (1947) All 399	201FB	1947 A L J 85		1947 AWRHC 99	392	1947 A L J 74
170	1946 A L J 480		1947 AWRHC 112		1947 OAHCB 56		1947 AWRHC 98
	1946 AWRHC 617	211FB	1947 A L J 215	302	228 I C 8		1947 OAHCB 55



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393	1947 AWRHC 276 1947 A L J 435 48 Cr L J 851	403	conILR (1947) All 431	411	con1947 AWRHC 125	429	1947 A L J 76
		404	1947 A L J 180	413	1947 AWRHC 12		1947 AWRHC 68
			1947 AWRHC 145		228 I C 424		229 I C 546
394	1947 OAHCB 15	405	229 I C 11		1947 AWRRev 22		1947 OAHCB 44
	1947 AWRHC 39		1947 A L J 177		1947 A L J 155		1947 OWNHC 32
	1947 A L J 103		1947 AWRHC 227		ILR (1947) All 138		48 Cr L J 449
	229 I C 539	407	1947 A L J 188	414	1947-15 I T R 393	431	1947 A L J 196
	48 Cr L J 443		1947 AWRHC 147		1947 A L J 454		1947 AWRHC 155
399	1947 AWRHC 283		1947 AWRRev 53	417	1947 A L J 141		1947 AWRRev 61
	1948 A L J 24	408	1947 A L J 208		1947 AWRHC 153	434	ILR (1947) All 394
400	1947 A L J 451		1947 AWRHC 271		1947 AWRRev 59		1947 A L J 277
	1947 AWRHC 315		48 Cr L J 858	419	1947 A L J 136		1947 OAHCB 61
403	1947 AWRHC 6	409	1947 A L J 108		1947 AWRHC 174		1947 AWRHC 193
	1947 OAHCB 7		1947 AWRHC 126	424	1947 AWRHC 336	436	48 Cr L J 866
	1947 A L J 112		1947 AWRRev 43		48 Cr L J 859		1947 A L J 253
	48 Cr L J 285	411	1947 A L J 110		1947 A L J 696		1947 AWRHC 266
							48 Cr L J 868

### CASES OVERRULED IN A. I. R. (34) 1947 ALLAHABAD

Ali Muhammad v. Zakir Ali, ('31) 53 All 771 = 1931 A. L. J. 611 = 18 A. I. R. 1931 All. 665 = 136 I. C. 369	Overruled in A. I. R. (34) 1947 P. C. 108.
Emperor v. Mangu, ('28) 50 All. 186 = 25 A. L. J. 866 = 8 L. R. A. Cr. 158 = 8 A. I. Cr. R. 551 = 29 Cr. L. J. 21 = 15 A. I. R. 1928 All. 22 = 106 I. C. 437	Overruled in A. I. R. (34) 1947 All. 225 (F.B.).
Emperor v. Ram Narain Rai, ('32) 54 All. 55 = 1932 A. L. J. 103 = 13 L. R. A. Cr. 74 = 17 A. I. Cr. R. 408 = 1931 Cr. C. 1046 = 32 Cr. L. J. 1072 = 18 A. I. R. 1931 All. 710 = 133 I. C. 800	Overruled in A. I. R. (34) 1947 All. 225 (F.B.).
Lukshuman v. Govind, ('03) 28 Bom. 74 = 5 Bom. L. R. 694	Overruled in A. I. R. (34) 1947 P. C. 200.
Magan Behari Lal v. Ram Partap Singh, ('39) I. L. R. 1939 All. 563 = 1939 A. L. J. 405 = 1939 A. W. R. 335 = 26 A. I. R. 1939 All. 535 = 184 I. C. 160	Held Overruled by 26 A. I. R. 1939 All. 535 (S.B.) in A. I. R. (34) 1947 All. 229.
Mahomed Aziz Uddin Ahmad Khan v. Legal Remembrancer to Government, ('93) 15 All. 321	Overruled in A. I. R. (34) 1947 All. 201 (F. B.).
Queen-Empress v. Muhammad Ali, ('01) 23 All. 81	Overruled in A. I. R. (34) 1947 All. 225 (F.B.).
Raj Narain v. Bindaban, ('36) 1936 A. L. J. 501 = 1936 R. D. 214 = 1936 A. W. R. 428 = 1936 All. L. R. 707 = 23 A. I. R. 1936 All. 449 = 163 I. C. 828	Held Overruled by 30 A. I. R. 1943 All. 190 (F.B.) in A. I. R. (34) 1947 All. 245.
Saudagar Singh v. Ganga Singh, ('21) 19 A. L. J. 702 = 8 A. I. R. 1921 All. 110 = 63 I. C. 274	Overruled in A. I. R. (34) 1947 All. 58 (F.B.).



Title

Author

Accession No.

Call No.

Borrower's  
No.

Issue  
Date

Borrower's  
No.

Issue  
Date

[REDACTED]

[REDACTED]



# THE ALL INDIA REPORTER 1947

## Allahabad High Court

[Case No. 1.]

**A. I. R. (34) 1947 Allahabad 1**  
FULL BENCH

ALLSOP Ag. C. J., VERMA, MALIK, WALI  
ULLAH AND SINHA JJ.

*Raghubar Dayal—Plaintiff—Appellant*  
*v. Panna Lal and others—Defendants—*  
*Respondents.*

Second Appeal No. 360 of 1944 Decided on 29-4-1946,  
from order of Civil Judge, Jhansi, D/- 26-5-1943.

U. P. Tenancy Act (17 (XVII) of 1939), S. 180—  
Section applies only to suits between landholder  
and tenants—Lambardar cannot eject cosharer by  
means of suit under S. 180.

Section 180 is intended to apply to persons one of  
whom is or claims to be a landholder and the other of  
whom claims to be in possession as a tenant.

[P 2 C 1]

One of the cosharers in a mahal as lambardar is not  
entitled to exclude all or other cosharers from the use  
of land by taking possession of it himself. Although  
the lambardar may be the agent of the cosharers for  
certain purposes, he does not thereby become the sole  
proprietor so as to deprive them of their proprietary  
rights.

[P 2 C 2]

Where a question arises between cosharers, including  
among them the lambardar, about the manner in which  
cosharers should use or enjoy the land, that is a ques-  
tion which would properly be decided by a suit in a  
civil Court and, in the last resort, if no satisfactory  
arrangement could otherwise be secured, by a suit for  
partition. A lambardar cannot bring a suit under  
S. 180, U. P. Tenancy Act for ejectment of a co-  
sharer who has taken possession of land which had  
been in the possession of certain tenants from which  
they had been ejected: 1941 R.D. 110, *Dissented from*;  
(40) 27 A.I.R. 1940 All. 370 (F. B.), *Approved*.

[P 3 C 1]

S. N. Verma — for Appellant.

S. N. Misra — for Respondents.

**Allsop Ag. C. J.** — This is a second appeal  
against a decree of the Civil Judge of Jhansi.  
The suit which has given rise to the appeal was  
1947 A/1 & 2

instituted in the Court of an Assistant Collector  
of the first class in Jhansi by the appellant, Seth  
Raghubar Dayal, in order to obtain the eject-  
ment of Panna Lal and others from certain  
agricultural plots upon the ground that the  
plaintiff was the lambardar of the Mahal in  
which the plots lay and that the defendants were  
trespassers. Panna Lal claimed to be in posses-  
sion as a cosharer in the mahal. The other defen-  
dants alleged that Panna Lal was alone in pos-  
session and that they were not in possession at  
all. The learned Assistant Collector framed an  
issue upon the question of Panna Lal's pro-  
prietary title and sent it to the civil Court for  
decision. The decision was that Panna Lal was  
a cosharer in the mahal. The learned Assistant  
Collector seems in error to have thought that  
the finding was against Panna Lal and he passed  
a decree for ejectment. Panna Lal appealed to  
the Civil Judge who set aside the decree of  
the learned Assistant Collector and dismissed  
the suit.

[2] The second appeal has been referred by  
two learned Judges of this Court to this Full  
Bench because of a difference of opinion upon a  
question of law between this Court and the  
Board of Revenue. The case of this Court in  
which the opinion was expressed was [Sultan  
Ahmad Khan v. Jalal-uddin] I. L. R. 1940 ALL.  
528.<sup>1</sup> The question which arose in that case was  
whether a lambardar could sue a cosharer for  
ejectment in a revenue Court under the provi-  
sions of S. 44, Agra Tenancy Act, 1926. The  
decision of this Court was that he could not do so.  
The decision turned upon terms of S. 44 of the Act  
which in so far as they are relevant, are that a

1. (40) 27 A.I.R. 1940 All. 370; I.L.R. (1940) All. 528;  
189 I. C. 189 (F. B.).



person taking or retaining possession of a plot or plots of land without the consent of the landholder shall be liable to ejectment. The landholder as defined in that Act was the person to whom rent was payable. This Court held that all the cosharers including the lambardar were landholders because the rent was ultimately payable to all of them in proportion to their shares in the mahal although the lambardar might, in some circumstances, have the right in the first instance to collect it. I do not think that it is necessary for us now to go into the question whether that decision was right, although I think that it was. The law is now contained in S. 180, United Provinces Tenancy Act, 1939, which is not exactly in the same terms as S. 44 of the Act of 1926. The present section is as follows :

"(1) A person taking or retaining possession of a plot or plots of land otherwise than in accordance with the provisions of the law for the time being in force and without the consent of the person entitled to admit him as tenant shall be liable to ejectment under this section on the suit of the person so entitled, or when the joint consent of more than one person is required on the suit of any one or more of such persons, and also to pay damages, which may extend to four times the annual rental value calculated in accordance with the sanctioned rates applicable to hereditary tenants.

(2) If no suit is brought under this section or a decree obtained under this section is not executed the persons in possession shall on the expiry of the period of limitation prescribed for such suit or for the execution of such decree, as the case may be, become a hereditary tenant of such plot or plots."

[3] In my judgment this section is intended to apply to persons one of whom is or claims to be a landholder and the other of whom claims to be in possession as a tenant. I would draw attention to the words 'admit him as a tenant' in the first sub-section and to the whole of the second sub-section. We have been referred to the decision of the Board of Revenue in the case of [Tej Singh v. Khem Chand] 1941 R. D. 110.<sup>2</sup> It has always been held that cosharers in a mahal are in the same position as tenants-in-common in English law, that is, each cosharer has a share in every part of the mahal and each cosharer is entitled to use any part just as much as any other cosharer provided that he does not permanently exclude the other cosharers. If a cosharer takes permanent possession of a part of the land in such a way as to prevent other cosharers from making use of it, the remedy for the other cosharers is to obtain a decree against him for joint possession or for the removal of any constructions which he may have made which lead to their exclusion or to obtain a decree for partition. It is obvious that persons who agree to share any property or acquiesce in the sharing of it must have such relations with each

other that they can amicably arrange for the use or enjoyment of that property by them all in a reasonable manner. If such relations do not exist the only course for them is to separate and partition the property. There is nothing in my judgment in the U. P. Tenancy Act, 1939, which disturbs the ordinary law about the relations of cosharers or tenants-in-common. In the absence of any definite statutory provision I cannot hold that one of the cosharers, as a lambardar, is entitled to exclude all or other cosharers from the use of land by taking possession of it himself; nor would I hold in the absence of any such definite provision that the right of cosharers to use and enjoy land which is their common property should be the subject of decision in a Revenue Court. If we were to take the contrary view the logical result would be that all suits for possession against trespassers over land in Revenue mahals would lie under S. 180, U. P. Tenancy Act, 1939, and that the jurisdiction of the civil Courts would be excluded. I may point out that a mahal is not an abstraction but an area of land and it would consequently follow that all suits against trespassers over land in a mahal except possibly over the village site would lie in the revenue Court, that is, that all suits about proprietary title in mahals or estates consisting of several mahals would be instituted, in the first instance, in the Revenue Court, although the actual question of proprietary title might be referred as an issue to the civil Court. It has never been understood that a dispute between two persons claiming proprietary title in a revenue mahal should be instituted in Revenue Courts. There is no logical distinction between isolated plots and the whole area of land in a mahal. Our attention has been directed to the provisions of S. 245, U. P. Tenancy Act, 1939, which defines the powers of lambardars and in particular to that part of the section which says that the lambardar is entitled to do all acts incidental to the proper management of the estate with a view to the common benefit. I do not think that this right of management extends to the ejectment by the lambardar of other cosharers from their khudkasht. We have considered the decision of the learned Members of Board of Revenue in the case of [Tej Singh v. Khem Chand].<sup>2</sup> With reference to it I must say, in the first instance, that a proprietor who appoints an agent does not thereby lose his proprietary title. Consequently, although the lambardar may be the agent of the cosharers for certain purposes, he does not thereby become the sole proprietor so as to deprive them of their proprietary rights. I also do not see why the result of our decision should be that a lambardar is not entitled to collect rents in accordance

2. ('41) 1941 R. D. 110.



with the statute in certain circumstances. He would be entitled to collect the rents as the statutory agent of the other cosharers. The cosharers might, by agreement, appoint some agent or attorney to collect rents on their behalf. That would not mean that the agent or attorney would become the landholder or that he would acquire proprietary rights against the cosharers. In my judgment, where a question arises between cosharers, including among them the lambardar, about the manner in which the cosharers should use or enjoy the land, that is a question which would properly be decided by a suit in a civil Court and, in the last resort, if no satisfactory arrangement could otherwise be secured, by a suit for partition.

[4] No question of jurisdiction has been raised in the case before us, but I certainly think that a lambardar is not entitled to eject one of the cosharers by means of a suit under S. 180, U. P. Tenancy Act, 1939. I would, therefore, dismiss the appeal.

**Verma J.**—I concur.

**Wali Ullah J.**—I agree.

**Sinha J.**—I agree.

[5] **Malik J.**—The facts have been fully set out in the judgment of the Hon'ble A. C. J. The point for decision in this case is whether a lambardar can bring a suit under S. 180, U. P. Tenancy Act, 1939, for ejectment of a cosharer who has taken possession of land which had been in the possession of certain tenants from which they had been ejected. In the case in [Sultan Ahmad Khan v. Jalal-uddin] I.L.R. (1940) ALL. 528<sup>1</sup> a Full Bench of this Court had held that such a suit did not lie under S. 44, Agra Tenancy Act of 1926. Under that section a landholder could file a suit for ejectment of a person who had taken possession of the holding without the consent of the landholder. It is urged on behalf of the appellant that the above case is no longer good law as the language of S. 180, U. P. Tenancy Act, 1939, has been altered and now a suit for ejectment can be filed against a person who has taken possession of land otherwise than in accordance with the provisions of the law for the time being in force and "without the consent of the person entitled to admit him as tenant" at the instance of the person so entitled. Reliance is also placed on S. 245 of the Act which sets out the powers of the lambardar. The lambardar, in accordance with the provisions of that section is not only entitled to collect rents and other dues but is also entitled to settle and eject tenants. But it must be remembered that he does all this on behalf of the entire body of cosharers. He is constituted an agent on their behalf and the cosharers do not cease to be cosharers and as such co-owners of

the property merely because there is a lambardar. The U. P. Tenancy Act, as the other Tenancy Acts preceding it, was primarily intended to regulate the relations between landlords and tenants or persons wrongfully claiming to be tenants. The rights as between landlords *inter se* are governed by certain stray provisions here and there, but there are no complete set of provisions governing relationship. A cosharer may no doubt, if he enters into a contract with the entire body of cosharers or with the lambardar as representing them, become a tenant of the body, though he as a cosharer is also a member of that body; but the tenancy in such a case would only arise by contract. As regards any plot of land in the village, every cosharer has got equal rights according to the extent of his share. If a cosharer peacefully takes possession of some land which is vacant, he does not thereby become either a tenant or a trespasser. If such land is cultivated by him, it may become his khudkasht as defined by S. 3, sub-s. (9) of the Act. Section 180 of the Act was intended to regulate the relations between landlords and tenants or persons wrongfully claiming to be tenants, but where a person is in possession of the holding as a proprietor or as a cosharer, no question of his ejectment under S. 180 as a trespasser can arise.

[6] For the reasons given by me above and for the reasons given in the judgment of the Hon'ble Ag. C. J. with which I agree, I would dismiss the appeal with costs.

**By the Court.**—The appeal is dismissed with costs.

D.S./K.S.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 3 [C. N. 2.]**

ALLSOP AG. C. J. AND MATHUR J.

*Mt. Shamim Fatma—Plaintiff—Appellant v. Ahmad Ullah Khan—Defendant—Respondent.*

Letters Patent Appeal No. 11 of 1945, Decided on 1-4-1946, from judgment of Bennet J. in S. A. No. 1236 of 1943, D/- 11-1-1945.

(a) Civil P. C. (1908), S. 11—Heard and finally decided—Question of legal cruelty by husband to wife in issue and finally decided in previous suit for restitution of conjugal rights—Decision operates as *res judicata* in subsequent suit for dissolution of marriage.

A muslim woman filed a suit for dissolution of marriage on the ground of cruelty by the husband. In a previous suit for restitution of conjugal rights filed by the husband she had resisted the suit on the ground of cruelty by the husband. This question was put in issue and finally decided against her :

*Held* that no evidence was admissible upon the point as the question was *res judicata* between the parties.

[P 4 C 1]

C. P. C. —

(44) Chitaley, S. 11, N. 7, Pt. 3.



(b) Dissolution of Muslim Marriages Act (1939), S. 2 (ii)—Wife refusing shelter offered by husband—Wife is not entitled to dissolution of marriage.

The Act does not mean that the husband is bound to follow his wife wherever she may go and force money, food or clothes on her. Where the husband's house was open to the wife but she refused to avail herself of the shelter which was offered to her she cannot complain and is not entitled to a decree for dissolution of marriage on the ground that the husband failed to maintain her. [P 4 C 1, 2]

*Mushtaq Ahmad and Ihsanul Haq*—for Appellant.  
*Baleshwari Prasad* — for Respondent.

**Allsop Ag. C. J.**—This is an appeal under the Letters Patent against a judgment of a learned Single Judge of this Court who set aside a decree for dissolution of marriage passed in favour of a Muslim woman under the provisions of the Dissolution of Muslim Marriages Act, 1939. The Courts below held that the plaintiff had proved that her husband had treated her with cruelty and that he had not maintained her for a period of two years. The learned Judge of this Court did not go into the question of fact. He came to the conclusion that the allegation about cruelty was barred by the rule of *res judicata* and that the husband had not been guilty of any failure in the matter of maintenance. The fact is that the husband and wife disagreed soon after they were married in the year 1922 and that they had never come together in spite of a decree for restitution of conjugal rights in favour of the husband. In the suit for restitution the present plaintiff, that is the wife, alleged that her husband had treated her with cruelty in that he had habitually beaten and abused her. This matter was in issue between the parties and it was finally decided by this Court that the present plaintiff had failed to establish that she had been habitually beaten or abused. This meant that it was held as between the parties that she had not been beaten or abused. In the present suit she had again made the allegation that she was beaten and abused and we think that the learned Single Judge was perfectly right in saying that no evidence was admissible upon the point because this question was *res judicata* between the parties. On the other point it has been argued that there is an absolute duty on a husband to maintain his wife and that the wife is entitled to a decree for dissolution of marriage even if she avoids the husband and refuses the shelter of his house which he offers to her. In our judgment there is no force in this argument. It must be remembered that the wife is not entitled to a decree for dissolution unless there is a failure on the husband's part. The Act does not mean that the husband is bound to follow his wife wherever she may go and force money or food or clothes upon her. In the present case the husband had obtained a decree for restitu-

tion and it seems that his house was open to his wife. If she refused to avail herself of the shelter which was offered to her, she cannot complain and is certainly not entitled to a decree. We, therefore, dismiss the appeal with costs.

G.B./D.H.

*Appeal dismissed.*

[Case No. 3.]

**A. I. R. (34) 1947 Allahabad 4**

ALLSOP AND MATHUR JJ.

*Rifaqatullah Khan* — Applicant

v.

*Emperor.*

Criminal Ref. No. 540 of 1945, Decided on 1st May 1946, made by Sessions Judge, Shahjahanpur.

Criminal P. C. (1898), S. 488 (8) — Word 'reside' means to live or have a dwelling place—Magistrate has no jurisdiction to proceed against person who lives outside and who has no dwelling house of his own within local jurisdiction of Magistrate.

The word 'reside' in S. 488 (8) means to live or to have a dwelling place or an abode. It cannot be treated as equivalent to something in the nature of having a domicile in a particular place or the place where the person's family used to live. Consequently a Magistrate has no jurisdiction to proceed under S. 488 against a person who is living in another district from many years and who has no abode of his own within the local jurisdiction of the Magistrate. The fact that his father resides there and he visits that place from time to time is immaterial. [P 4 C 2; P 5 C 1]

**Cr. P. C.—**

('46) Chitale, S. 488, N. 28, Pt. 15.

('41) Mitra, S. 488, page 1581, para. 1288.

*L. N. Gupta* — for Applicant.

*Baleshwari Prasad* — for Opposite Party.

*Deputy Government Advocate* — for the Crown.

**Allsop J.**—This is a reference made to us by the learned Sessions Judge of Shahjahanpur that proceedings in the Court of a Magistrate in that district under the provisions of S. 488, Criminal P. C., should be quashed on the ground that the Magistrate had no jurisdiction. The man against whom an application was made that he should maintain his wife lives in Pesbawar where he is employed in the Government Secretariat. It does not appear that he had ever lived in Shahjahanpur. The finding is that his family originally came from Shahjahanpur and that his father after retirement settled in that place. There is no evidence that the man against whom proceedings were taken has any property in Shahjahanpur or has ever lived there. The learned Magistrate has assumed jurisdiction because in our judgment he has misunderstood the meaning in English of the word 'reside.' He has treated the word as equivalent to something in the nature of having a domicile in a particular place or having a place as your place of origin or the place where your family used to



live. That is not, in our judgment, the meaning of the word in English. 'To reside' means to live or to have a dwelling place or an abode. This man has never lived in Shahjahanpur for many years. He has no house there. It is true that he may be a welcome guest in his father's house from time to time, but that is quite a different matter. He has no property there, no furniture and no abode of his own to which he can go from time to time or at any time if he wishes to do so. It is perfectly clear that he cannot possibly be said to reside in Shahjahanpur within the proper meaning of that term. We, therefore, accept the reference and quash the proceedings.

K.S.

*Proceedings quashed.*

[Case No. 4.]

**A. I. R. (34) 1947 Allahabad 5**

VERMA AND MATHUR JJ.

*Ch. Ram Chander and others—Appellants v. Chaubey Ramdas and others—Objectors-Respondents.*

Second Appeal No. 1393 of 1943, Decided on 7-12-1945, from order of Dist. Judge, Aligarh, D/-24-9-1942.

(a) U. P. Land Revenue Act (3 (III) of 1901), S. 233 (k)—Application by *B* for partition of *Mahal*—Cosharer landlords and one *J* impleaded as opposite parties—*J* not pleading that share entered against names of cosharer landlords had become his by adverse possession—Subsequent application by cosharer landlords under S. 4, U. P. Encumbered Estates Act—Claim by *J* that he had become owner of the share by adverse possession is not barred.

One *B* applied for partition of his share in a *Mahal* under the U. P. Land Revenue Act and arrayed the cosharer landlords as opposite parties, as their names appeared in the *Khewat*. In those partition proceedings one *J* who was arrayed as one of the opposite-parties did not state that he had become owner by adverse possession of the share against which the names of the cosharer landlords were entered. Subsequently the cosharer landlords filed an application under S. 4, U. P. Encumbered Estates Act, and in the written statement the share referred to in the partition proceeding was shown as belonging to them. *J* pleaded that he had become owner of this share by adverse possession. It was contended that as *J* did not in previous partition proceeding state that he had become owner of this share by adverse possession his claim to that effect in subsequent proceeding under the U. P. Encumbered Estates Act was barred by S. 233 (k), U. P. Land Revenue Act:

*Held* that the claim was not barred by S. 233 (k): (20) 7 A. I. R. 1920 All. 21, *Rel. on.* [P 7 C 1]

(b) U. P. Land Revenue Act (3 (III) of 1901), S. 233 (k)—Application under S. 11, U. P. Encumbered Estates Act claiming property shown by landlords applicants in written statement as belonging to them—Applicant whether can be said to "institute suit or other proceeding in Civil Court" (*Quære*).

Whether a person, who files an application before a special Judge under S. 11, Encumbered Estates Act, putting forward a claim to an item of property shown by the landlords-applicants in their written statement as belonging to them, can be said to "institute any suit

or other proceeding in the Civil Court" within the meaning of S. 233 (k). [P 7 C 1]

*Mushtaq Ahmad, Baleshwari Prasad and Ram Narain Verma*—for Appellants.

*C. B. Agarwala and M. L. Chaturvedi*—for Respondents.

**Verma J.**—This is an appeal against a decision of the learned District Judge of Aligarh, dated 24th September 1942, upholding the decision of a Special Judge dated 2nd October 1941, of the second grade in proceedings under the United Provinces Encumbered Estates Act. The appellants were the landlords applicants under S. 4 of the Act and Chaube Jagannath, the deceased father of the respondents, had preferred a claim under S. 11 of the Act to certain property. The Courts below have agreed in deciding that claim in favour of Chaube Jagannath.

[2] The essential facts are these. As has already been stated, an application under S. 4 Encumbered Estates Act was filed by the present appellants in the year 1936, and in the written statement filed by them under S. 8 of the Act the property in dispute was shown as property belonging to the landlords. The proceedings prescribed by the Act were taken in due course and Chaube Jagannath, as already stated, made an application to the Special Judge claiming this particular item of property and stating that it belonged to him and not to the landlords-applicants. The main ground on which the claim of Chaube Jagannath was based was that he had, by adverse possession for more than twelve years as against the landlords-applicants, become the owner of the property. Various defences were raised, among them being the pleas that Chaube Jagannath's claim was barred by estoppel, by S. 11, Civil P. C. and by S. 233 (k), United Provinces Land Revenue Act, and issues were framed by the Special Judge with regard to these pleas. The Special Judge, by a judgment dated 6th July 1939, held that Chaube Jagannath had not acquired title to the property in dispute by adverse possession. Having arrived at that decision on the merits, he did not record findings on the issues framed on the question of estoppel, *res judicata* and the bar of S. 233 (k), Land Revenue Act. Chaube Jagannath took an appeal to the Court of the District Judge and the learned Judge, by a judgment dated 21st March 1940, allowed his appeal and, reversing the decision of the Special Judge, held that it was established that Chaube Jagannath had acquired title to the property in question by adverse possession for more than twelve years as claimed by him. The learned Judge remanded the case to the Court of the Special Judge with the direction that the remaining issues should be tried and decided. The Special Judge



thereupon took up the issues which had remained undecided and held in favour of Chaube Jagannath on all the questions raised by those issues. He accordingly held that the claim of Chaube Jagannath was established and that he, and not the landlords-applicants, was the owner of the property in question. The landlords-applicants thereupon went up in appeal to the Court of the District Judge and that Court, as has been stated above, dismissed their appeal. The landlords-applicants have consequently filed this second appeal in this Court.

[3] The only question which was argued in the lower appellate Court, and which has been argued before us, is that the claim put forward by Chaube Jagannath was barred by the provisions of s. 233 (k), Land Revenue Act. The facts bearing upon this matter are as follows:—The parties to this appeal and one Balwant Singh were co-sharers in a Mahal called "Mahal Ghair Khwastgaran". In the year 1934 Balwant Singh applied under the provisions of the Land Revenue Act for the partition of his share in that Mahal, and arrayed the parties to this appeal—and, possibly, other co-sharers—as opposite parties. The parties to this appeal raised no objection to the partition being made as desired by Balwant Singh, and Balwant Singh's application was granted and the partition was made. The appellants were impleaded by Balwant Singh as opposite parties in those partition proceedings as their names appeared in the Khewat. The contention of the appellants is and has been in the Courts below that, as Chaube Jagannath did not in those partition proceedings state that he had become owner by adverse possession of the share against which the names of the appellants were entered, his present claim was barred by s. 233 (k), Land Revenue Act. It may be mentioned here that the pleas of estoppel and *res judicata*, as distinct from the plea based on s. 233 (k), Land Revenue Act, have not been pressed before us. The sole question that arises for our consideration therefore, is whether, upon the facts stated above, the plea that Chaube Jagannath's claim is barred by s. 233 (k), Land Revenue Act is well-founded.

[4] On behalf of the appellants strong reliance has been placed on certain stray sentences in the judgment of their Lordships of the Privy Council in [Bajrang Bahadur Singh v. Rai Beni Madho Baksh Singh] 19 Luck. 508.<sup>1</sup> The only authorities on which the appellants have placed reliance here as well as in the Courts below is that judgment of their Lordships. The argument is that their Lordships of the Privy Council have in that case made observations which

support the contention that Chaube Jagannath's claim is barred by s. 233(k). We are unable to accept the contention of the appellants' learned counsel that the sentences on which he places reliance are any authority for the proposition contended for. We are relieved, however, of the necessity of dealing with the passages relied upon in detail because of what their Lordships themselves make clear in the penultimate paragraph of their judgment. The question which their Lordships had to consider, and which they decided, was whether, on the facts of that particular case, the ground on which Raza and Srivastava JJ., had based their decision—viz. barred by s. 233 (k)—or the ground on which Wazir Hasan C. J., had held that the suit was not maintainable—viz. that the suit was barred by *res judicata*, but not by s. 233 (k) was correct. In this connection they had to consider the correctness or otherwise of the judgment of Richards C. J., in [Bijai Misir v. Kali Prasad Misir] 39 ALL. 469<sup>2</sup> and of the views expressed in [Ram Rekha v. Lallu Misir] 53 ALL. 568,<sup>3</sup> and they held that the interpretation placed by Richards C. J., and by the learned Judges who decided the case in [Ram Rekha Misir v. Lallu Misir]<sup>3</sup> on s. 233 (k) was too narrow. Their Lordships, after carefully analysing the various provisions in Chap. VII, Land Revenue Act, headed "Partition and Union of Mahals", referred to the words "except as provided in ss. 111 and 112" in clause (k) of s. 233, Land Revenue Act and observed as follows: [A.I.R. 1938 P.C. 210 (215)]

"The exception makes it exceedingly difficult to maintain that the only thing excluded from the cognizance of the Civil Court by clause (k) is the schematic arrangement of the land into units of area and that no question of proprietary right comes within the prohibition of access to the Civil Court."

[5] As has been pointed out by a Full Bench of the Chief Court at Lucknow in [Rameshar Singh v. Hanwant Singh] 15 Luck. 557,<sup>4</sup> their Lordships in [Rai Bajrang Bahadur Singh's case<sup>1</sup>] only decided what the meaning of the word "partition" in Chapter VII and s. 233 (k) was, and further that no civil suit would lie in respect of matters arising for decision *between contending co-sharers*. It has further been pointed out by the learned Judges constituting the Full Bench in [Rameshar Singh's case<sup>4</sup>] that their Lordships did not decide that no civil suit would lie between persons whose interests were not opposed for the purposes of the particular partition carried out by the Collector. We entirely agree with this interpretation of the

2. (17) 4 A. I. R. 1917 All. 258 (260); 39 All. 469 : 41 I. C. 912 (F. B.).

3. (31) 18 A. I. R. 1931 All. 462 (465) : 53 All. 568 : 133 I. C. 468.

4. (40) 27 A. I. R. 1940 Oudh 354 (360); 15 Luck. 557 : 189 I. C. 357 (F. B.).

1. (38) 25 A.I.R. 1938 P. C. 210 (214); 13 Luck. 508 : 32 S. L. R. 845 : 65 I. A. 314 : 175 I. C. 775 (P. C.).



judgment of the Privy Council. The matter is put beyond doubt by what the Privy Council themselves have said in the penultimate paragraph of their judgment. The material portion of that paragraph is as follows:

"The facts of the present case raise no question . . . . . as to any case between persons whose interests were not opposed for the purpose of the partition."

[6] Their Lordships went on to observe that a considerable number of decisions had been given upon a case of that description—besides cases of other types mentioned in the paragraph—but that their Lordships had not had occasion to hear argument upon them and did not deal with them — "more especially as their Lordships consider that their decision upon the point arising in the present case is in conformation of the main current of authority in India." It is thus clear that, in view of the facts of the present case, the decision of their Lordships in [*Rai Bajrang Bahadur Singh's case*<sup>1</sup>] is not only not in favour of the appellants, but is really against them.

[7] Learned counsel for the respondents has invited our attention to several decisions of this Court in which it has been held that S. 233 (k) does not bar a suit brought in respect of a dispute between persons who were arrayed on the same side as non-applicants in the partition proceedings and between whom no controversy arose in those proceedings. It will be sufficient to mention only one of them, namely, [*Lal Bihari v. Parkali Koer*] 42 ALL. 309.<sup>5</sup> We have come to the conclusion, therefore, that the appeal is without force.

[8] It may be stated here that it is open to considerable doubt whether a person, who files an application before a Special Judge under S. 11, Encumbered Estates Act putting forward a claim to an item of property shown by the landlords-applicants in their written statement as belonging to them, can be said to "institute any suit or other proceeding in the Civil Court" within the meaning of S. 233 (k). We do not, however, consider it necessary to express any definite opinion on this question as the view that we have taken on the other point is sufficient for the disposal of this appeal. The appeal is dismissed with costs.

D.S./D.H.

*Appeal dismissed.*

5. ('20) 7 A.I.R. 1920 All. 21(21); 42 All. 309; 55 I.C. 22.

[Case No. 5.]

A. I. R. (34) 1947 Allahabad 7

MATHUR J.

*Megah Nath and another — Appellants v. The Collector, Cawnpore — Respondents.*

Second appeal No. 1745 of 1944, Decided on 22-11-1945, from decision of Additional Civil Judge, Cawnpore, D/-13-4-1944.

Limitation Act (1908), Art. 132 — Mortgage with default clause — Mortgagee has option to sue for entire money on default—Limitation does not start if option is not exercised — The word 'money' in Art. 132 refers to the entire mortgage money.

Where the mortgage money is payable by instalments and the deed provides that the mortgagee is entitled to recover any instalment as it falls due and in default of its payment is further entitled to sue for the entire money limitation does not start when only one instalment becomes due. No doubt the mortgagee has an option to sue for the entire money on the happening of the default, but if he does not exercise that option, limitation does not start running. The analogy of Art. 75 would not be applicable. ('32) 19 A. I. R. 1932 P. C. 207, *Followed*. [P 8 C 1]

Limitation Act—

('42) Chitaley, Art. 132, N 24, Pt. 6.

S. N. Seth—for Appellants.

Brijlal Gupta—for Respondents.

**Judgment.** — This is a defendants' second appeal. The suit out of which this appeal arises was brought by the Collector of Cawnpore as Manager of the estate of Raj Bahadur and Shiam Lal under the Court of Wards for recovery of sum of Rs. 800 by enforcement of a simple mortgage bond dated 7th February 1899, executed by Puttan the father of the defendants appellants. The mortgage money was payable by annual instalments of Rs. 25 each during a period of 32 years. It was further provided in the bond that the mortgagee was entitled to recover any instalment as it fell due and in default of its payment was further entitled to sue for the entire mortgage money. Among other pleas it was contended that the claim was barred by 12 years limitation as having been brought 12 years after the first default, when the money became due. The learned Munsif who originally tried the suit decreed the claim for recovery of Rs. 100 only being the last four instalments, while he dismissed the suit with regard to the rest of the claim as being barred by time. The plaintiff went in appeal and the learned Additional Civil Judge of Cawnpore modified the decree of the learned Munsif and passed a decree for the entire mortgage money in favour of the plaintiff respondent. It is now urged in this second appeal on behalf of the defendants that the decision of the learned Additional Civil Judge was not correct, and that the claim with regard to all the instalments except the last four was barred by limitation.

[2] I have heard the learned counsel for the parties, and in my judgment in view of the Privy Council decision in [*Lasa Din v. Mt. Gulab Kunwar*] A. I. R. 1932 P. C. 207<sup>1</sup>, the finding of the learned Additional Civil Judge cannot be assailed. It seems to me that the decision of the point in question would depend

1. ('32) 19 A.I.R. 1932 P.C. 207 (211); 7 Luck. 442; 59 I. A. 376; 138 I. C. 779 (P.C.).



on the interpretation of the wordings of Art. 132, Limitation Act. In the said Article it is provided that the period of limitation would start from the time the money sued for becomes due. The word "money" refers to the entire mortgage money and the limitation would not start when only one instalment becomes due. There is no doubt that an option is given to the mortgagee to sue for the entire mortgage money on the happening of a default, but if he does not exercise that option the limitation does not start running. The analogy of Art. 75 would not be applicable because according to that Article the period of limitation of an instalment bond runs from the time when the default is made. It was further pointed out by their Lordships of the Privy Council that a proviso entitling the mortgagee to sue for the entire mortgage money was inserted exclusively for his benefit and that on the default of the mortgagor to pay an instalment "the mortgage money" would not become immediately due because that would be giving an option to the mortgagor. It has also been pointed out that upon such default the mortgagor would have no right to redeem and the mortgage money does not "become due within the meaning of Art. 132 of the Limitation Act until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued." I am therefore fully satisfied that the claim was not barred by time and the decision of the learned Additional Civil Judge was correct. The appeal fails and is dismissed with costs.

G. B./D. H.

*Appeal dismissed.*

[Case No. 6]

**A. I. R. (34) 1947 Allahabad 8****FULL BENCH****IQBAL AHMAD C. J., BRAUND AND****PATHAK JJ.**

*M. Ulfat Rai — Decree-holder — Appellant v. Birendra Singh — Judgment-debtor — Respondent.*

Exn. First Appeals Nos. 528 of 1943 and 86 of 1944, Decided on 8-5-1946, from order of Civil Judge, Farrukhabad, D/- 30-1-1943.

(a) U. P. Debt Redemption Act (13 [XIII] of 1940), S. 17 — "Agriculturist holding land," meaning of — To determine whether land is protected under S. 17 local rate payable by agriculturist at date of passing decree is to be taken into account.

An "agriculturist" within the meaning of S. 17 is a person who holds land as an agriculturist at the date of the decree. Therefore, for the purpose of determining the land that is protected from sale under S. 17 the local rate payable by the agriculturist against whom decree is passed is to be taken into account. Thus, if at the time of passing of the decree the land has come to be sub-divided in interest the qualification as to a rate of Rs. 25 per annum would apply to each of the distri-

butive portions, shares or interests in which the land was then held : ('44) 31 A. I. R. 1944 All. 126 (F. B.), *Explained and followed.* [P 9 C 1; P 10 C 1]

(b) Interpretation of statutes — Construction of Act must be uniform for all cases.

An Act cannot be construed variously to suit various cases. Only one construction is possible and that construction must be uniform for all cases. [P 9 C 2; P 10 C 1]

*B. R. Avasthi* — for Appellant.

*S. N. Verma* — for Respondent.

**Braund J.** — These are Execution First Appeals referred to us as a Full Bench. The facts are simple and we do not propose to set them out further than is strictly necessary. So far as First Appeal No. 528 of 1943 is concerned, they are that on 11-1-1941—a date which, it has to be observed, was subsequent to the coming into force of the U. P. Debt Redemption Act—a suit was started by a certain M. Ulfat Rai, who is the present opposite party decree-holder, against Janki Saran and his brother Ram Saran. Ulfat Rai's suit was for the usual mortgagee's relief on a simple mortgage.

[2] When this suit was begun, Janki Saran had three children, Rajendra Singh, Narendra Singh and Birendra Singh, and it is common ground that he and the three children constituted a joint Hindu family. Within two months of the suit, however, Janki Saran died on 18-2-1941, and thereupon his three sons were substituted as defendants instead of their father.

[3] On 10-9-1941 the usual preliminary decree for sale was passed in the suit against the sons of Janki Saran, who then, of course, were defendants in place of their father and Ram Saran. The widow of the uncle of Janki Saran was also a party to the suit, but that is an immaterial circumstance for our present purpose. Ultimately on 5th September 1942 a final decree was passed. Thereafter Ram Saran died, himself leaving three children surviving him who ultimately became parties to the proceedings.

[4] This was the position when late in 1942 the decree-holder, M. Ulfat Rai, resorted to execution proceedings against the children of the two brothers for the purpose of getting the property sold in execution of his final decree of 5th September 1942. At that stage the objection was taken by the children or some of them which has now become the subject of the issue before us.

[5] To put the matter as shortly as we possibly can, these children claimed the benefit of S. 17, U. P. Debt Redemption Act. That section, which is described as a section to secure the protection of certain land from sale or transfer, provides that the land of an agriculturist who pays a local rate of twenty-five rupees or less is to be immune from sale in execution of a decree to which the Act applies and that such land is



also to be immune from a final decree for foreclosure. The actual section, so far as material, runs thus:

"17. (1) Notwithstanding anything contained in S. 16 or in any other law for the time being in force —

(a) the land of an agriculturist, the local rate payable by whom or recoverable from whom does not exceed twenty-five rupees per annum, shall not be sold or otherwise transferred in execution of a decree to which this Act applies, nor shall a final decree for foreclosure be passed in respect of such land, and

(b) in the case of any other agriculturist —

(i) only so much of this land may be sold or otherwise transferred in execution of a decree to which this Act applies, or

(ii) a final decree for foreclosure may be passed in respect of only so much of his land, as would, after such sale or transfer or foreclosure leave with him and the local rate payable in respect of which would be at least rupees twenty-five per annum . . . ."

[6] The question, therefore, is whether, for the purpose of S. 17 of the Act, the land for which immunity from sale is sought is, in order to ascertain whether the local rate does or does not exceed twenty-five rupees per annum, to be regarded as the whole of the land which belonged to the father, Janki Saran, at the date when the suit was started, or the land as, in consequence of his death, it had come to be sub-divided in interest among his children. It really amounts to a question of the construction of the five words "the land of an agriculturist." If the agriculturist there referred to means the agriculturist who was the agriculturist at the date when the suit was started, then, of course, it is the whole aggregate of the land held by him that must be taken into account. If, on the other hand, it means the land of those persons who had come to hold it at the date of the decree, or alternatively at the date when the execution proceedings were begun, then, in a case in which the land had come by then to be sub-divided in interest the qualification applying a rate of twenty-five rupees per annum might well be argued to apply to each of the distributive portions, shares or interests in which the land was then held. Indeed that is the argument which has been advanced in this case and accepted by the learned Civil Judge of Farrukhabad. He appears to have held that in this case each of the sons of Janki Saran was an agriculturist within the meaning of the expression contained in S. 17 and that the distributive portion, share or interest of each son was, for the purposes of the section to be taken as "the land of an agriculturist" to which the twenty-five rupees per annum test had to be applied. Putting that in another way, he held first that the land was not to be regarded in the aggregate as land of the joint Hindu family but as the land of the various members of the family; and, secondly, that the proper date at which the test

of S. 17 had to be applied was at any rate not the date of the suit but some date subsequent to that.

[7] In the view we take this question is no longer open to argument before us by reason of the decision of our own Full Bench in the case of [Shatrughan Singh v. Kedar Nath] I.L.R. (1944) ALL. 288.<sup>1</sup> That too was a case in which a decree-holder had started a suit and obtained a decree against a defendant. But in that case, after the date of the decree, the defendant had died and his sons had taken his place as judgment-debtors. This case, therefore, raised precisely the same point as the case before us, except for the variation that in the case before us, the original defendant-agriculturist, Janki Saran, died between the date on which the suit was started and the date on which the decree was obtained, whereas in the case before the previous Full Bench the defendant died between the date on which the decree was obtained and that on which the execution proceedings were started. The learned Judges composing the previous Full Bench, however, treated the question as one of the general construction of S. 17 of the Act and the *ratio decidendi* of their judgment is, we think, as applicable to the facts before us as it was to the facts before them. The learned Judges make that clear at p. 290 of their judgment in which they say:

"... The question then arises whether the Legislature in using the words 'an agriculturist' in S. 17 had in contemplation (1) the agriculturist incurring the loan; or (2) the agriculturist against whom a decree with respect to a loan was passed; or (3) the agriculturist who, by transfer, succession, or otherwise, may have succeeded to the land of the original debtor and against whom the decree is sought to be executed."

[8] The learned Chief Justice in his judgment in the previous Full Bench,<sup>1</sup> with which the other learned Judges were in agreement, said:

"For the reasons given above I hold that, for the purpose of determining the land that is protected from sale under S. 17, the local rate payable by the agriculturist against whom the decree was passed is to be taken into account and not the local rate that may be payable by his legal representatives, or transferees . . ."

[9] It follows, therefore, that out of the three alternatives before that Full Bench—namely the date of the original suit, the date of the decree or the date of the execution proceedings—the learned Judges deliberately chose the date of the decree in preference to the date of the suit. It is true that at one point it was said they refrained from expressing an opinion as to whether the words of S. 17 might refer to the original debtor. But, in the view we take, the Act cannot be construed variously to suit various cases. Only one construction is possible

1. (1944) 31 A. I. R. 1944 All. 126 : I. L. R. (1944) All. 288 : 214 I. C. 125 (F. B.).



and that construction must be uniform for all cases. We think, therefore, that no room remains for expressing any further opinion as to whether the words "an agriculturist" might refer to the original debtor when once it has been determined, (as it has been determined in the previous Full Bench) that the agriculturist against whom the decree is passed is to be taken as the agriculturist referred to in S. 17.

[10] In the case before us it is common ground that the sons against whom the decree was passed were themselves individually agriculturists. However entertaining it might be to reopen this question and now to consider whether the point of time at which the test should be applied should not be taken even further back to the date when the suit was started, or to the date when the original loan was incurred, it would, we think, only be adding confusion to the settled law if we were now to allow that question to be canvassed afresh. We are, moreover, bound by the previous Full Bench ruling of our own Court, whether or not we think that fresh argument might throw new light upon the matter. The previous Full Bench decision has clearly chosen the date of the decree as the relevant date and we see no reason, therefore, why that decision should not be applied in this case.

[11] For these reasons we shall hold that the objector, being one of the sons of Janki Saran, was entitled to the protection of S. 17, U. P. Debt Redemption Act, in respect of his individual holding in the land and, accordingly that this appeal must be dismissed with costs. Precisely the same reasoning applies to the other appeal No. 86 of 1944 before us and that too will be dismissed with costs.

**Iqbal Ahmad C. J.**—I agree.

**Pathak J.**—I also agree.

N.S./D.H.

*Appeals dismissed.*

### A. I. R. (34) 1947 Allahabad 10 [C. N. 7.]

BRAUND J.

*Ram Ghulam — Defendant—Applicant v. Kandhai Lal—Plaintiff—Opposite party.*

Civil Revn. Nos. 423 and 424 of 1944, Decided on 18-10-1945, from order of Judge, Sm. C. C., Allahabad, D/- 31-5-1944.

(a) U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), S. 39 (1)—Nature of document—Document must be brought into existence for purpose of evidence of transaction.

In order to comply with the provisions of S. 39 (1) the document need not be in any particular form, nor is it necessary that it should be signed. The section, however, contemplates some document that is brought into existence for the purpose of constituting as between the debtor and creditor the evidence of the transaction and of its terms, of which the debtor can be given a

copy so that he may have a record of the full terms of the liability to which he has engaged himself.

[P 11 C 2]

An entry in the creditor's account books, which he makes for the purpose of keeping for himself a record of his own transactions is not a document contemplated by S. 39 (1).

[P 11 C 2]

(b) U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), S. 39 (1)—Section is vaguely worded.

Section 39 (1) of the U. P. Agriculturists' Relief Act is a piece of extremely vague legislation. It may be that it is deliberately vague but that is a circumstance which makes it no easier to construe the section.

[P 11 C 1]

(c) U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), S. 39 (1) and R. 12 framed under S. 41 — Rule is of no assistance in construing section.

Rule 12 of the Rules framed by the Provincial Government under S. 41 says 'the following documents will be deemed to satisfy the requirements of S. 39,' but in construing the sections of a statute no assistance can be derived from what the Provincial Government may have thought it proper to say should 'be deemed to satisfy' the requirements of an Act of the Legislature. The question is not what the Provincial Government by Rule says 'shall be deemed' to satisfy the section but what, on the proper construction of the section, does satisfy it.

[P 11 C 1, 2]

*Brij Mohan Lal Srivastava* — for Applicant.

*M. L. Chaturvedi* — for Opposite party.

**Order.**—These are two connected revisions. They arise out of different suits—Nos. 1224 and 1523—in the Small Cause Court.

[2] In Suit No. 1224 the present respondent Kandhai Lal sued the applicant Ram Ghulam for a sum of money part of which he claimed was a loan and part of which he claimed was the price for cloth supplied to the defendant. The amount of the alleged loan was Rs. 137 and the price of the cloth was Rs. 63.

[3] The other suit in the Small Cause Court was a cross suit in which the defendant Ram Ghulam in effect said that Kandhai Lal had borrowed a sum of Rs. 150 from him. That suit was really a set-off by the defendant against the plaintiff's claim in the other suit.

[4] The Small Cause Court Judge tried the question and he came to the conclusion that Kandhai Lal had established his case against Ram Ghulam, but that Ram Ghulam had failed to establish the alleged loan by him to Kandhai Lal. Those are questions of fact which I do not propose to go into now and, in any case, they are questions upon which I should have seen no reason to disturb the finding of the Small Cause Court Judge.

[5] Now, the principal piece of evidence on which the Small Cause Court Judge based himself in finding the debt by Ram Ghulam to Kandhai Lal established was the *bahi khata* of Kandhai Lal himself. We can take it for this purpose that the *bahi khata* was the plaintiff's account book in which he entered the debt due on the sale of cloth and also the debt due on



the loan to him by the defendant. As evidence of the transaction that, no doubt, was quite satisfactory; but the question was raised as to whether it complied with S. 39, U. P. Agriculturists' Relief Act.

[6] Section 39, U. P. Agriculturists' Relief Act says :

"(1) Every loan given after the date on which this Act comes into force shall be evidenced by a written document, of which a copy shall be given to the debtor."

[7] The learned Judge rightly pointed out that S. 39 (1) did not require the written document to be prepared or signed by anyone in particular and that, therefore, any written document would suffice to satisfy the conditions of S. 39 (1) of the Act. Accordingly, he held that the plaintiff's *bahi khata* was sufficient for the purpose and he overruled Ram Ghulam's claim that the provisions of the statute had not been complied with.

[8] The only question which is open in this revision is whether the learned Judge was right in holding that the conditions of S. 39 (1) had been complied with.

[9] Section 39 (1), U. P. Agriculturists' Relief Act is a piece of extremely vague legislation. It may be that it is deliberately vague; but that is a circumstance which makes it no easier to construe. It is quite true that no particular form of written document is prescribed. It need apparently be signed by no one. The only clues we are given as to the character of the written document required are that first it must "evidence" the loan; and, secondly, it must apparently be a document of which a copy is capable of being given to the debtor. The purpose of the section is, of course, obvious; namely that everything possible shall be done on the part of the creditor to see that his debtor knows exactly the obligation to which he is engaged and the terms of it. In other words, the section is designed to see that no advantage is taken of the agriculturist debtor. Those appear to me to be the only clues which there are to the true construction of the section. I derive no assistance whatever from the Rules under the Agriculturists' Relief Act which purport to have been made by the Provincial Government under S. 41 of the Act. Rule 12 of those Rules says that : "... The following documents *will be deemed* to satisfy the requirements of S. 39 of the Act ..." and *inter alia*, the ledgers of a bank are included in those documents. But in construing the sections of a statute I can derive no assistance whatever from what the Provincial Government may have thought it proper to say should "be deemed to satisfy" the requirements of an Act of the

Legislature. The Provincial Government, of course, has not the slightest right by rule to specify that anything shall "*be deemed*" to satisfy the provisions of a statute, which does not in law comply with it. The rule-making power of the Provincial Government is strictly prescribed by what is consistent with the Act and it does not help the Court in any way in construing the Act to be referred to something that the Government has taken upon itself to say — with what authority I cannot conceive—"shall be deemed" to satisfy the law. The question is not what the Provincial Government by Rule says "shall be deemed" to satisfy the Section, but what on the proper construction of the section does satisfy it.

[10] The question in this case is by no means an easy one; and, I think, is one very largely of first impression. I appreciate fully that the Legislature has not intended to prescribe any particular form of document or even to prescribe that it should be signed. But, at the same time, it does seem to me to be implicit in the section that the document should be something that has been brought into existence — not casually and for another purpose altogether — but for the purpose of constituting evidence of the transaction as between the debtor and the creditor. Now, in the case of a *bahi khata* or any other private ledger or account book that the creditor may keep, he, no doubt, goes home and makes, or directs his clerk to make, an appropriate entry in it for the purpose of keeping for himself a record of his own transactions. We do not know when that entry is made. It may be made at the time or several days or weeks later. It might contain a reference to the terms of the loans, such as interest and so forth; but it probably would do nothing more than to contain a figure in the debit column of the debtor's account. I have some difficulty in thinking that an entry by a creditor entirely for his own domestic purposes, in his own private accounts — accounts of which he would not dream of sending a copy to his debtor — can really be regarded as a written document which "evidence" the loan within the meaning of S. 39 (1) of the Act. I think that S. 39 contemplates some document that is brought into existence for the purpose of constituting as between the debtor and the creditor the evidence of the transaction and of its terms, of which the debtor can be given a copy so that he may have a record of the full terms of the liability to which he has engaged himself. I do not think that it contemplates an entry in the creditor's domestic books for some other purpose altogether.

[11] As I have said, this is really a matter of first impression and it may well be that others



might take a different view from this. That, however, is the opinion I hold of the proper construction of Section 39 (1). In those circumstances I do not think that the learned Small Cause Court Judge was altogether right in this respect. In this view of the matter, the suit would fail to the extent that the claim represented money borrowed. I think, therefore, that this revision must be partially allowed and that the result of the suit should be that there will be a decree in favour of the plaintiff, Khandhai Lal, for Rs. 63-12-3, less that proportion of Rs. 43 which Rs. 63-12-3 bears to Rs. 137, together with interest on such nett sum at the rate of six per cent. per annum from the date of the loan until the date of payment. Someone else must do that calculation. As regards the other revision, I shall not interfere in any way. As to the costs, the applicant will be entitled to the costs of the Revision No. 423 which I have allowed, but will have to pay the costs of Revision No. 424 which I dismiss. Those will cancel out. In other words the simplest order as to costs will be that there shall be no costs in respect of the two revisions.

G.B./D.H. *Rev. No. 423 partially allowed.*  
*Rev. No. 424 dismissed.*

[Case No. 8.]

**A. I. R. (34) 1947 Allahabad 12**  
**YORKE J.**

*Bala Prasad and another — Applicants v. Emperor.*

Criminal Ref. No. 1460 of 1945, Decided on 4-4-1946, made by Sessions Judge, Jhansi, D/- 23-10-1945.

Defence of India Rules (1939), R. 119 — Publication of Cotton Cloth and Yarn Control Order 1943, in Government of India Gazette constitutes publication within Rule 119 : ('46) 33 A. I. R. 1946 All. 223, *Dissented from*.

The publication of the Cotton Cloth and Yarn Control Order in the Government of India Gazette constitutes such a publication as is required by R. 119 and the persons affected by the order are to be deemed to have been duly informed of the order : ('46) 33 A. I. R. 1946 All. 223, *Dissented from*; ('46) 33 A. I. R. 1946 Pat. 1 (F.B.), *Rel. on*. [P 12 C 2 ; P 13 C 1]

*Assist. Govt. Advocate — for the Crown.*

**Order.** — This is a reference made by the Sessions Judge of Jhansi for setting aside a conviction of two persons for an offence under R. 81 (4), Defence of India Rules by reason of the contravention by the applicants of the provisions of cl. 14, Central Government's Cotton Cloth and Yarn Control Order of 1943. The learned Sessions Judge has recommended the setting aside of that order on two grounds : Firstly that there was no publication of the Control Order within the meaning of R. 119, Defence of India Rules, and secondly that the plea of guilty which was accepted by the learned

Magistrate was not really a plea of guilty. So far as the second point is concerned, it does not seem to me that there is any force in it at all. The applicants knew what the charge against them was and they tried to plead guilty. The trial was a summary trial and the plea was duly recorded and there is no justification for going behind that plea.

[2] The only ground for going behind the plea of guilty might be the first ground relied upon by the learned Sessions Judge, namely, the ground that the publication of the Cotton Cloth and Yarn Control Order in the Government of India Gazette did not constitute such a publication as is required by R. 119, Defence of India Rules. The learned Magistrate has not referred to any cases, but he says that there may be presumed to have been a publication in the Gazette, but that does not satisfy the provisions of the section. He might possibly have referred to three cases of this Court, two of them decided by Mulla, J. and one by Waliullah, J. but the two cases decided by Mulla, J. were both of them in reference to orders made by District Magistrates and not to orders made by the Government of India published in the Official Gazette. On the other hand, in [Akbar v. Emperor] 1945 A. L. J. 499,<sup>1</sup> Waliullah J. has held that although there was a publication in the Official Gazette, the mere publication in the Official Gazette cannot be held to comply with the provisions of R. 119. The presumption, therefore, that the persons concerned must be deemed to have been duly informed of the order (in that case the U. P. Cattle, Sheep and Goat (Slaughter) Control Order, 1943) does not arise and therefore the accused could not be convicted for any contravention of the Control Order. This question of the effect of publication of such an order, specifically in the particular case, Cotton Cloth and Yarn Control Order, 1943, was considered by the Patna High Court in [Mahadeo Prasad Jayaswal v. Emperor] A. I. R. 1946 Pat. 1,<sup>2</sup> where it was held by the Full Bench that the Cotton Cloth and Yarn Control Order, 1943, which was published in the Government of India Gazette was duly published according to law, so as to affect the persons concerned with notice of the order. In the first head-note the matter is shortly stated thus: [A. I. R. 1946 Pat. 1]

"It is a well known practice of the Central and Provincial Governments to publish their Acts and Notifications in their Official Gazettes. Therefore when an order passed by the Central or the Provincial Government is published by it in the Official Gazette it may be presumed that the Government while publishing the

1. ('46) 33 A. I. R. 1946 All. 223 (226) : 1945 A. L. J. 499 : 224 I. C. 76.

2. ('46) 33 A. I. R. 1946 Pat. 1 (9) : 24 Pat. 781 : 223 I. C. 263 (F. B.).



order was aware of the provisions of R. 119 (1) and the publication was made in compliance with all its provisions including the provision as to the determination of the most suitable form of publication."

[3] It, of course, follows from this that the persons affected by the order are to be deemed to have been duly informed of the order. With great respect that is in accord with my own view, and on the strength of this decision, I think that I am justified in differing from the view taken by my brother Waliullah, J. in 1945 A. L. J. 499<sup>1</sup> referred to above. I accordingly reject this reference.

V.R./D.H.

*Reference rejected.*

[ *Case No. 9.* ]

**A. I. R. (34) 1947 Allahabad 13**

SINHA J.

*Bhajan Lal—Applicant v. Emperor.*

Cri. Misc. No. 239 of 1946, Decided on 6-5-1946.

Criminal P. C. (1898), S. 526 (1) (a)—Friendship between Magistrate and lawyer—Inference against Magistrate's integrity is not justified — Whether apprehension is reasonable or not is matter of personal equation — Reluctance of Magistrate to give effect to S. 205 — This may raise reasonable apprehension.

In a big town it is not surprising if a particular official, especially an Honorary Magistrate who belongs to the town, is a friend of a particular member of the Bar engaged in a case before him but that cannot, by any means, justify an inference against the integrity of the Magistrate or of the lawyer concerned. But there may still be a reasonable apprehension in the minds of the party that he shall not have justice at the hands of the Magistrate. In order to arrive at a conclusion, whether an apprehension is reasonable or unreasonable, it is not possible to weigh the thing in golden scales inasmuch as it is so much a question of personal equation. [P 14 C 1]

The reluctance of the Magistrate to give full effect to the salutary principle enshrined in S. 205 of the Code may raise a reasonable apprehension in the mind of the accused that they will not have a fair deal : 23 I.C. 489 (Cal.) and ('27) 14 A.I.R. 1927 All. 149, Ref. [P 14 C 1]

It is a matter of public policy that justice should not merely be done but should appear to be done: ('45) 32 A. I. R. 1945 P. C. 38, Foll. [P 14 C 1]

**Cr. P. C. —**

('46) Chitaley, S. 526, N. 5, Pts. 5 to 7 and 78.

*P. C. Chaturvedi* — for Applicant.

*Govt. Advocate* — for the Crown.

**Order.**—This is an application for transfer of a criminal case. On a complaint made by one Jiwan Lal, a case under S. 323, Penal Code, was started against Bhajan Lal, his uncle, Neksa Ram, his mother, Mst. Har Piari and his aunt, also named Har Piari. The charge against them was that, while the two ladies held him by force, the two male accused beat him. The complaint was moved before the Sub-Divisional Magistrate of Atrauli and the case was transferred, thereafter, to the Court of Khan Bahadur Sheikh Mohammad Yunnus, an Honorary

Magistrate. Evidence under S. 202, Criminal P. C. was recorded on 4th December 1945, and summonses were issued returnable on 17th December 1945. The case was taken up on the latter date, but, although the summonses had not returned after due service, Bhajan Lal and Neksa Ram, according to the affidavit of the former, were present in Court. They were directed to appear on 2nd January 1946. The order passed on this date is in these terms :

"Case taken up. The complainant present. The accused absent :

Ordered, Let non-bailable warrants issue for the accused for their appearance on 2nd January 1946. . . ."

[2] On 22nd January 1946, an application was presented on behalf of the two ladies for their exemption under S. 205, Criminal P. C. On that date, the affidavit continues, Bhajan Lal and Neksa Ram were present, although the warrants remained unserved and an application was again made on behalf of the ladies for their exemption from personal attendance in Court. On this date this application was rejected by the learned Magistrate and 14th January was the next date fixed. A prayer under S. 205 was renewed on that day and was granted by the learned Magistrate, on 16th January 1946. Curiously enough, Bhajan Lal proceeds to say, on 5th February 1946, non-bailable warrants were again issued against the two ladies, although there was in existence an order of 16th January 1946, by which the prayer had been granted. These are, in brief, the allegations in support of the application for transfer and the real reason which has been assigned is that two lawyers, Mr. Abdul Ghaffar Khan and Mr. Mohammad Muqim Ansari, were engaged on behalf of the complainant on 2nd January 1946, and it was due to their influence that the Magistrate passed the order adverse to the accused. The learned Magistrate has submitted a long and careful explanation. He has naturally denied the charge that the two lawyers were his favourites and were responsible for the order passed either on that date or on subsequent dates. He has definitely said in his explanation that the accused were not present on 17th December 1945, and he has also made it clear that the non-bailable warrants for the arrest of the ladies were actually not issued and, although an order to that effect was passed, it was necessary because they had consistently flouted the Court.

[3] I have carefully considered the allegations in the affidavit and also the explanation. I am satisfied that the accused have not made out any case against the integrity and fair-mindedness of the learned Magistrate concerned. It may be that the two lawyers engaged by the complainant on 2nd January were friends of the



learned Magistrate; in a big town like Aligarh it is not surprising if a particular official, especially an Honorary Magistrate who belongs to the town is a friend of a particular member of the Bar but that cannot, by any means, justify an inference against the integrity of the Magistrate or of the lawyers concerned. I also do not believe that the Magistrate was even guilty of excess of zeal, let alone an act of indiscretion in the orders which he passed. But on a consideration of all the facts, I have come to the conclusion that there may be a reasonable apprehension in the minds of the accused that they shall not have justice at his hands. In order to arrive at a conclusion, whether an apprehension is reasonable or unreasonable, it is not possible to weigh the thing in golden scales inasmuch as it is so much a question of personal equation. What may raise an able apprehension in the mind of one may leave the other unaffected. In this particular case, I do not find anything in the explanation of the learned Magistrate why he did not give effect to the salutary principle enshrined in S. 205, Criminal P. C. The accused are Vaishyas and the presumption is that the ladies are purdanasheen. The learned Magistrate has, at one place, said that they, on one occasion, went to the Court. The importance of giving effect to the rule of law contained in S. 205, Criminal P. C. has been emphasised in [Raj Rajeshwari Debi v. Emperor] 17 CWN 1248<sup>1</sup> and [Mt. Tirbeni v. Mt. Bhagwati] A. I. R. 1927 All 149.<sup>2</sup> The reluctance of the learned Magistrate to give full effect to this principle might have raised a reasonable apprehension in the minds of the accused that they will not have a fair deal. I am not oblivious to the fact that S. 205 leaves the discretion with the learned Magistrate. I am not calling in question the propriety of his order; I am only deciding the question whether his attitude is not responsible for generating a feeling of genuine apprehension in the mind of the accused. In a recent case, [Vassiliades v. Vassiliades] 1945 A. L. J. 34<sup>3</sup> their Lordships of the Judicial Committee have emphasised the equally salutary principle that justice should not merely be done but *appear* to be done. Say their Lordships: [A. I. R. 1945 P. C. 38 (40)]

"It is a matter of public policy that justice should not merely be done but should appear to be done."

[4] It may be that the accused might have by their own indiscretion or obstinacy courted the trouble, but even this aspect of the matter

has been considered and dwelt upon by their Lordships. Say they at the same page: [A. I. R. 1945 P. C. 38 (40)]

"Judges, however, are only human, and their patience is sometimes sorely tried by Counsel and litigants. It is always to be regretted if their patience even appears to give way."

[5] On a consideration of all the facts, I have come to the conclusion that the case should be transferred from the Court of Khan Bahadur Sheikh Mohammad Yunnus to some other Magistrate and I order accordingly. The learned District Magistrate shall transfer the case to the file of some other Magistrate.

V.R./D.H.

Order accordingly.

[Case No. 10.]

A. I. R. (34) 1947 Allahabad 14

MALIK J.

*Firm Sagarmal Har Saran Das—Defendants-Appellants v. L. Bishambar Sahai—Plaintiff—Opposite party.*

Civil Revn. Case No. 221 of 1945, Decided on 1-3-1946, from decree of Judge, Sm. C. C., Meerut, D/ 17-1-1945.

Contract Act (1872), S. 30—A entering into wagering contract with Pucca Arhatia—A from time to time depositing with Pucca Arhatia cover or margin money—Transaction resulting in loss—A cannot recover amount of cover money from Pucca Arhatia.

The position of a pucca Arhatia or a *del credere* agent is the same as that of a principal. [P 15 C 1]

One A entered into certain wagering contracts with B, a Pucca Arhatia who was to buy and sell grain on A's account, the delivery of the grain not being contemplated. A from time to time deposited some money with B as "*sai*" or cover or margin. The transactions, however, resulted in a loss and B filed a suit for recovery of the loss. It was held in that case that the transactions being of a wagering nature, B was not entitled to get a decree, and the suit failed. Subsequently A filed a suit for recovery of the cover money deposited by him:

Held that the contract being wagering contract was void *ab initio* and was governed by S. 30 of the Contract Act. A was not entitled to recover the cover money deposited by him with B. Section 65, Contract Act could not help A as it only refers to an agreement which is discovered to be void or which becomes void: ('27) 14 A. I. R. 1927 All. 238; 25 All. 639; ('18) 5 A. I. R. 1918 Mad. 163 and ('25) 12 A. I. R. 1925 Mad. 281, *Disting.*; ('20) 7 A. I. R. 1920 All. 167 and ('44) 31 A. I. R. 1944 All. 196, *Rel. on.* [P 15 C 2]

Held also that S. 70, Contract Act had no bearing on the facts of the case. S. 70 only relates to an obligation to pay for goods which were given to another without any intention that he should not pay for the same. There was in the case no question of B enjoying the benefits of a non-gratuitous act. [P 15 C 2; P 16 C 1]

R. B. Jaini—for Appellants.

D. Sanyal—for Opposite Party.

**Order.**—This revision has been filed under S. 25, Small Cause Courts Act. The plaintiff, Bishambar Sahai, lives in Meerut, while the defendant firm Sagar Mal Har Saran Das

1. ('13) 23 I. C. 489 (491) : 17 C. W. N. 1248.

2. ('27) 14 A. I. R. 1927 All. 149 (150) : 99 I. C. 126.

3. ('45) 32 A. I. R. 1945 P. C. 38 (40) : 221 I. C. 603 : 1945 A. L. J. 34 (P. C.).



carries on the work of a Pucca Arhatia at Hatras. The plaintiff entered into certain wagering contracts with the defendant who was to buy and sell grain on plaintiff's account, the delivery of the grain not being contemplated. The plaintiff from time to time deposited some money with the defendant as "sai" or cover or margin. The transactions, however, resulted in a loss and the defendant filed a suit for recovery of the loss. It was held in that case that the transactions being of a wagering nature, the defendant was not entitled to get a decree, and the suit failed. The plaintiff has now filed this suit for recovery of the cover money deposited by him. The suit was decreed by the Court below and the defendant has filed this revision.

[2] The argument on behalf of the defendant is that it was admitted that the defendants were Pucca Arhatias and it was held in the previous litigation that the transactions between the plaintiff and the defendant were as principal and principal. He has urged that if the defendant is not entitled to recover his losses, the plaintiff should also not be entitled to recover the money deposited by him. The lower Court has relied on a Division Bench Ruling of this Court in [Hardeo Das Nanak Chand v. Ram Prasad Shyam Sundar Lal] 25 A. L. J. 223.<sup>1</sup> Learned counsel for the plaintiff has drawn my attention to another Division Bench Ruling of this Court in [Bhola Nath v. Mool Chand] 25 ALL. 639.<sup>2</sup> In both these cases, however, the principal had brought a suit for recovery of the money which was in the hands of his agent. The law is now well settled that, even if a contract is of a wagering nature, if the defendant has incurred loss on behalf of his principal, the principal is liable to make good that loss. The defendant cannot be made to suffer loss on behalf of his principal merely on the ground that the contract between the principal and the third party was of a wagering nature. Similarly, an agent cannot keep to himself the money which has come into his hands to the credit of his principal merely on the ground that the contract between the principal and the third party was of a wagering nature. The agent can neither make a gain nor be made to suffer a loss. The position of a Pucca Arhatia or a *del'cradere* agent is the same as that of a principal and it has been held *inter partes* in the previous case that the defendant must be deemed to be a principal and is, therefore, not entitled to get a decree for the loss suffered in the wagering transactions. The cases relied on by learn-

ed counsel for the plaintiff are, therefore, clearly distinguishable.

[3] Learned Counsel for the respondent has relied on two single Judge decisions of this Court in [Chhanga Mal v. Sheo Prasad] 42 ALL. 449<sup>3</sup> and in [Ram Gopal v. Govind Das] A. I. R. 1944 ALL. 196.<sup>4</sup> If I may say so with great respect, I entirely agree with these decisions and hold that the amount was not recoverable. A wagering contract is void *ab initio* and is governed by S. 30, Contract Act. The relevant portion of that section reads as follows :

"Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made . . ."

[4] Section 65 of the Act cannot help the plaintiff as that only refers to an agreement which is discovered to be void or which becomes void.

[5] Learned counsel for the plaintiff has urged that when he paid these sums to the defendant the defendant became a trustee for the amount and was, therefore, liable to repay the same. He has relied in support of his proposition on two cases of the Madras High Court in [Venkata-raju v. Ramanujam] 34 M. L. J. 561<sup>5</sup> and in [Nagappa Pillai v. Arunachalam Chetty] 47 M. L. J. 876.<sup>6</sup> The facts of those cases were entirely different. In the latter case the Bench held that the contract was separable into two halves and the portion enforced by the Court had nothing to do with the part that was of a wagering nature. In the first case the Court held that the plaintiff before he could come to a Court for an equitable relief must come with clean hands. It could be hardly argued in the present case that the plaintiff's hands were clean. The defendant had on plaintiff's request entered into various transactions on plaintiff's behalf which had caused him loss which the plaintiff is not willing to pay and further wants him to refund the cover money which he had deposited with the defendant. Under the language of S. 30 of the Act itself the amount would not be recoverable.

[6] Learned counsel for the plaintiff has next relied on S. 70, Contract Act. I do not see what bearing that section has to the facts of this case. Section 70 only relates to an obligation to pay for goods which were given to another without any intention that he should not pay for the

3. ('20) 7 A. I. R. 1920 All. 167 : 42 All. 449 : 55 I. C. 965.

4. ('44) 31 A. I. R. 1944 All. 196 (197) : I. L. R. (1944) All. 397 : 219 I. C. 381.

5. ('18) 5 A.I.R. 1918 Mad. 163 (164) : 44 I. C. 319 : 34 M. L. J. 561.

6. ('25) 12 A.I.R. 1925 Mad. 281 (282) : 85 I.C. 1016 : 47 M. L. J. 876.

1. ('27) 14 A. I. R. 1927 All. 238 : 49 All. 438 : 100 I. C. 774 : 25 A. L. J. 223.

2. ('03) 25 All. 639 (641).



same. There is no question of the defendant enjoying the benefits of a non-gratuitous act. To my mind, the suit was wrongly decreed by the Court below. I allow this revision, set aside the decree of the lower Court and dismiss the plaintiff's suit with costs in both the Courts.

D.S./D.H.

*Revision allowed.*

[Case No. 11.]

**A. I. R. (34) 1947 Allahabad 16**

SINHA J.

*Mt. Sofia Begam — Appellant v. Syed Zaheer Hasan Rizvi — Respondent.*

Second Appeal No. 977 of 1945, Decided on 22-1-1946, from order of Dist. Judge, Allahabad, D/- 9-1-1945.

(a) Civil P. C. (1908), S. 100—Suit for restitution of conjugal rights—Legal cruelty is mixed question of fact and law — High Court can go into evidence and draw its own conclusions.

In a suit for restitution of conjugal rights the question whether the evidence on record establishes legal cruelty on the part of the husband being a mixed question of law and fact, it is open to the High Court in second appeal to go into the evidence and arrive at a conclusion of its own: ('27) 14 A. I. R. 1927 P. C. 102; ('28) 15 A. I. R. 1928 All. 39 and ('28) 15 A. I. R. 1928 All. 381, *Ref.* [P 17 C 1]

Civil P. C. —

('44) Chitaley, S. 100, N. 28, Pt. 12.

(b) Muhammadan Law—Restitution of conjugal rights, suit for — Habitual cruelty on part of husband is valid defence—Act (8 [VIII] of 1939) has made distinct endeavour to ameliorate lot of women and Courts must appreciate evidence and apply law in consonance with spirit of Legislature—Dissolution of Muslim Marriages Act (8 [VIII] of 1939).

The rights of a Muhammadan wife have been greatly enlarged by the Dissolution of Muslim Marriages Act, 1939 (8 [VIII] of 1939) by which the Legislature has made a distinct endeavour to ameliorate the lot of the wife and in a suit for restitution of conjugal rights the Courts must appreciate the evidence and apply the law in consonance with the spirit of the Legislature.

[P 18 C 1]

In a suit for restitution of conjugal rights by a Muhammadan husband, the wife pleaded legal cruelty on the part of the husband. A letter written by the wife to her father was adduced in evidence to establish the plea. The letter ran as follows :

"Today he—the husband — beat me very much. I could not stand this beating. It is better that I should consider myself a widow. I would rather live without such a husband. Please come at once and take me from here or I should come with somebody or step out of the house all by myself. You please come and take me. I want a judicial separation. As I am writing this letter I am weeping and shedding tears."

*Held* that the letter did not show an isolated beating but evidenced habitual beating on the part of the husband. The letter was therefore sufficient to establish legal cruelty on the part of the husband so as to disentitle him to any relief. [P 17 C 2; P 18 C 1]

M. A. Kazmi — for Appellant.

B. S. Darbari and Ihsanul Haq — for Respondent.

**Judgment.**—This is an appeal by a defendant against whom a suit for restitution of

conjugal rights was dismissed by the learned Munsif, but decreed by the learned Civil Judge.

[2] The parties are Mohammedans and were married so far back as the year 1933. It appears that, after the marriage, they got a number of children and, although it is difficult to say what precisely their relations were from the very inception, the present suit was instituted only in 1941. It appears that, sometime in that year, the defendant 1, the wife, went to live with her father, Khan Bahadur Sana Ullah, one of the defendants in this action, at Dehra Dun. She refused to come back to Allahabad, with the result that the present suit was instituted. The plaintiff's case was that he was a good husband and the wife, left to herself, would come back to him, but for the sinister influence exercised by her parents.

[3] The defence, in the main, was that, from the very beginning, the relations between the parties left a great deal to be desired, if they were not positively unhappy. After some time the husband became more and more aggressive and, later on, more and more cruel till, on a certain day in January 1941, he administered her a severe beating, which endangered her life and, at all events, raised a reasonable apprehension in her mind that she would not find a safe home under the roof of her husband. Another plea was raised, namely, that the prompt portion of the dower had not been paid and this disentitled the husband from making the present claim.

[4] The learned Munsif in a judgment, marked by care and ability, dismissed the suit. On the legal question whether the non-payment of the dower debt disentitled the plaintiff from bringing the suit, he held in the plaintiff's favour. He went into the evidence and came to the conclusion that the marriage had never been happy and that, as time wore on, the treatment of the husband deteriorated, with the result that it became so bad that it amounted to legal cruelty within the meaning of the law.

[5] The husband went in appeal. The learned Civil Judge, in a judgment which does not indicate a correct appreciation of the facts or law, has reversed the finding of the learned Magistrate (*Sic*, munsif). Most of the judgment is devoted to considerations which are absolutely irrelevant to the case. It may be that the treatment of the plaintiff's father-in-law towards him was not what it should have been. I am prepared to go a step further and assume that it was positively bad. But the relations between the plaintiff and his father-in-law could not legally affect the fate of the suit. The plaintiff was to stand or fall by his own treatment to his wife and not by the treatment of his father-in-



law to himself. The parties produced a number of documents. On a consideration of all the documents and the oral evidence, the learned Munsif came, as I have already indicated, to a conclusion in favour of the wife. On a consideration of the same evidence—a number of documents—the learned Civil Judge held otherwise.

(6) Sitting in second appeal it is open to me to go into the evidence and arrive at a conclusion of my own: *vide* [Dhanna Mal v. Moti Sagar] 25 A. L. J. 959<sup>1</sup> as interpreted in [Mt. Beti v. Sikhdar Singh] 25 A. L. J. 1014,<sup>2</sup> at page 1017, and [Gopi Lal v. Abdul Hamid] 26 A. L. J. 887,<sup>3</sup> at p. 893. But I am relieved of the necessity of doing so, inasmuch as I find one document noticed by the learned Civil Judge himself, which completely gives away the plaintiff's case; indeed, it entirely puts him out of Court. It is a letter addressed by the wife to her father. It is not dated, but the date can be gathered from the envelope enclosing it.

[7] Before I address myself to this letter, I might clear the ground by noticing the objection of the learned counsel for the respondent. It is argued that this letter was not put to the plaintiff, when he was in the witness-box. It is also argued that the fact that it bears no date detracts from its value, if it does not entirely destroy its effect. That it is undated is not surprising. The wife was living—if her statement is to be accepted—with an unkind husband, who was anxious—if she is further going to be believed—that there should be no correspondence between her father and herself. She must, therefore, have stolen a few moments with great difficulty to scribble a few lines. And if she did not have enough time to sign that letter or to go through the other ordinary formalities, it will not affect the evidentiary value of such a document. One has only to visualise the scene in an Indian family, where a wife has to live in such conditions. It is not surprising that the letter is unsigned. But what is surprising is that she could have found some time to write such a letter in such adverse circumstances.

[8] As regards the objection that it was not put to the plaintiff in the witness-box, it is singularly devoid of merit. It was produced in evidence on the date of the issues, after which the plaintiff offered to go into the witness-box. It lay upon him to place before the Court his explanation. He did not take any such step and must, therefore, take the consequences.

[9] If this letter can be taken as evidence—as I think and I am clear that it must be—it is a document which, as I have already said, puts the plaintiff completely out of Court. Into the antecedent history it is not necessary to enter after this letter. I think that its importance demands that it should be quoted in extenso.

*"Aj unhone mujhe bahut mara. Mujhse unki mar nahin khai gai. Is se bahtar yeh hi hai ki men samjhun ki men rand hun. Aese shauhar se men baz ai. Ap akar mujh ko fauran le jaiye ya men khud kisi ke sath ya akeli ghar se nikalkar chali aungi. Ap mujhko akar le jaiye. Men khula ke darkhast dekar inse alahdgi karna chahti hun. Yeh khat men roti jati hun aur likhti jati hun."*

[10] Its English rendering is in these words:

*"Today he—the husband—beat me very much. I could not stand this beating. It is better that I should consider myself a widow. I would rather live without such a husband. Please come at once and take me from here or I should come with somebody or step out of the house all by myself. You please come and take me. I want a judicial separation. As I am writing this letter I am weeping and shedding tears."*

[11] This letter does not show merely an isolated beating, but it evidences habitual beating, which culminated in the fateful beating of that particular day. If there had been no other evidence on the record it was quite enough to dismiss the suit for restitution of conjugal rights and I am surprised that any experienced judicial officer should have dismissed this piece of evidence in the manner in which the learned Civil Judge has done. I had better quote his own words:

*"The quarrel which appears to have caused this whole trouble was an incident reported by Mt. Sophia Begum in Ex. P-2 in which she says that her husband beat her and wrote to her father to come and take her away. There is no evidence whether a few slaps were given to Mt. Sophia Begum or some stick was used, but no injury is reported in this letter by Mt. Sophia Begum. So I conclude that she was given a few slaps. I do not know what was the circumstance that resulted in this quarrel, but a solitary instance cannot amount to a legal cruelty as understood under Muslim law to justify the refusal of the restitution of the conjugal rights. In every house-hold some quarrels arise and when one party is impulsive, such things do occur but soon they are forgotten and the pair continues to live on as happily as before. Family life is not a bed of roses, it is full of difficulties and those difficulties give rise to quarrels but this does not mean that as soon as any quarrel develops, whatever its nature, the parties should separate."*

[12] I can only say that the above makes amazing reading. It is true that the tendency of the law is to set up a home and not to break it. But the conception of a home is peace and harmony and not where one party dominates and illtreats the other. To my mind, all the premises of the learned Civil Judge are wrong. In the first place, as I have said, this letter evidences a habitual cruelty. It is not a few slaps administered gently by a loving husband to a beloved wife, which would have made the

1. (27) 14 A. I. R. 1927 P. C. 102 (104): 8 Lah. 573 : 54 I. A. 178 : 101 I. C. 355 : 25 A. L. J. 959 (P. C.)  
2. (28) 15 A. I. R. 1928 All. 39 (41): 50 All. 180: 103 I. C. 721: 25 A. L. J. 1014.  
3. (28) 15 A. I. R. 1928 All. 381 (385): 116 I. C. 91: 26 A. L. J. 887.



wife write it. It says: "It is better that I should consider myself a widow. I would rather live without such a husband." It is only when a wife is driven to desperation that she raises such a cry. The letter also shows that, as she writes this, she is shedding tears. How the learned Civil Judge should have placed such an interpretation upon it I cannot follow. The language of the letter being clear and explicit, it fell upon the plaintiff to explain whether what he administered was a few slaps or heartless beating. He has not offered any explanation and I must take it, on its plain reading, that he was guilty of gross cruelty. The interpretation which I have placed upon this letter will deprive the plaintiff of all relief on the basis of any civilised system of law and it cannot be denied that the Muslim law is no exception. I, however, propose, having regard to the earnestness of Mr. Darbari, the learned counsel for the respondent, to notice a few of the authorities on which he has taken his stand.

[13] He has relied upon the Holy Quran by Maulvi Muhammad Ali (Edn. 2) p. 211. The relevant passage is:

"Men are the maintainers of women, because Allah has made some of them to excel others and because they spend out of their property; the good women are therefore obedient, guarding the unseen as Allah has guarded; and (as to) those on whose part you fear desertion, admonish them, and leave them alone in the sleeping places and beat them; then if they obey you, do not seek a way against them; surely Allah is High, Great."

[14] It will be observed that it speaks of fear of "desertion." It is not a case of desertion or apprehended desertion. The passage, therefore, has no bearing.

[15] He next relies upon [Asmati Bibi v. Saimuddi Pathan] A. I. R. 1925 Cal. 533,<sup>4</sup> at p. 536. The whole of the evidence on the question of legal cruelty in that case amounted to 'simple chastisement once or twice.'

[16] The state of affairs disclosed by this letter does not amount to "simple chastisement once or twice," but it evidences something much more violent and serious to the wife. This authority too is hardly in favour of the plaintiff.

[17] There is yet another aspect of the matter which must be considered. The rights of a Mohammedan wife have been greatly enlarged by the recent enactment, the Dissolution of Muslim Marriages Act, 1939 (8 [VIII] of 1939). By this Act, the Legislature has made a distinct endeavour to ameliorate the lot of the wife and we must appreciate the evidence and apply the law in consonance with the spirit of the Legislature.

[18] I, therefore, think that the view taken by the learned Civil Judge was wrong. I, there-

fore, allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs, in all Courts. Leave to appeal under the Letters Patent is refused.

K.S.

*Appeal allowed.*

[Case No. 12.]

**A. I. R. (34) 1947 Allahabad 18**

**FULL BENCH**

**VERMA, BRAUND AND PATHAK JJ.**

*The Benares Bank Ltd., Benares—Objector Appellants v. Bhagwan Das and others—Applicants and Ratanlal and another (Creditors) Opposite party—Respondents.*

First Appeal No. 34 of 1943, Decided on 8-5-1946; from decision of Special Judge, 1st Grade, Benares, D/- 25-9-1942.

(a) U. P. Encumbered Estates Act (25 [XXV] of 1934), S. 11 (2) — Claim under S. 11 (2) by third party to property of landlord — Appeal by unsuccessful claimant—All creditors whether contesting proceedings in lower Court or not are necessary parties.

In an appeal by a third party claimant against the dismissal of his claim under S. 11 (2) to the property of the landlord all creditors of the landlord whether they contested the proceedings in the lower Court or not are necessary parties and the appeal is incompetent if all of them are not made parties to it: ('41) 28 A. I. R. 1941 Oudh 580; ('42) 29 A. I. R. 1942 Oudh 16 and ('42) 29 A. I. R. 1942 Oudh 339, *Rel. on.* [P 22 C 1]

There are two tests for determining the question as to who is a necessary party to a proceeding. Firstly, there must be a right to some relief against such party in respect of the matter involved in the proceedings in question and secondly it should not be possible to pass an effective decree in the absence of such a party. Applying these tests it is clear that the creditors of the landlord are necessary parties to the proceedings under S. 11 (2) in respect of claims preferred by third parties to the property of the landlord. The omission in S. 11 of provision for the issue of notice to the creditors does not affect the position. As all the creditors are necessary parties to the proceedings under S. 11 they are necessarily so to appeal arising out of those proceedings, whether they contested those proceedings or not, as the appeal is a mere continuation of the original proceedings. [P 20 C 2 : P 21 C 2]

The creditors become parties to the proceedings under S. 11 (2) after the notices under S. 9 have been served upon them and in any event after they have filed the written statements of their claims and continue to be parties to the proceedings until their debts are liquidated or the proceedings are terminated in accordance with the provisions of the Act. There is no provision in the Act for the representation of the creditors by another person and in the proceedings under the Act the creditors are parties not as beneficiaries represented by some trustee but in their individual capacity. [P 21 C 1, 2]

**C. P. C. —**

('44) Chitaley, O. 1, R. 10, N. 13 Pt. 1; O. 1, R. 9, N. 2 Pt. 4; N. 5 Pt. 5.

(b) U. P. Encumbered Estates Act (25 [XXV] of 1934)—Object of.

The object of the Act is (1) to compel the landlord to surrender his entire property for the benefit of his



creditors and (2) to liquidate the debts of all the creditors of such a landlord in accordance with, and to the extent permitted by the Act. [P 20 C 2; P 21 C 1]

(c) U. P. Encumbered Estates Act (25 [XXV] of 1934), S. 11 (2)—Claim proceedings under, contested by some creditors of landlord — Appeal—Contesting creditors only impleaded — They can raise objection that appeal is incompetent in absence of other creditors.

Where the claim proceedings under S. 11 (2) were contested by some only of the creditors of the landlord and they alone were impleaded as respondents to the appeal by the unsuccessful claimant they can raise the objection that as all the creditors of the landlord are necessary parties to the appeal, the appeal is incompetent in the absence of other creditors. The objection relates to the constitution of the appeal itself and, therefore, it is immaterial whether the objection is raised at the instance of the creditors who contested the proceedings in the Court below and not at the instance of those who were omitted from the memo of appeal. [P 21 C 2]

*Sir Syed Wazir Hasan and C. S. Saran*

— for Appellants.

*C. B. Agarwala* — for Respondents.

**Braund J.**—I have had the benefit of reading the judgment of my learned brother Pathak J. and am reluctantly compelled to share his view, although, without intending any disrespect to his opinion, I could have wished to be able to do otherwise.

[2] The U. P. Encumbered Estates Act is no more nor less than a code for administration of the assets of the landlord. As I understand the principles of the administration of assets, it is common to most schemes of administration that the estate should be represented by a statutory guardian, so as to avoid creditors and other beneficiaries individually being 'necessary' parties in all proceedings, a course which, in cases where creditors are numerous, may well bring the administration to a standstill or make it so cumbersome as to be unworkable. That is the principle of the administration of assets in insolvency and in companies winding-up, and, in the case of the administration of trusts and the estates of deceased persons, under O. 31, R. 1, of the First Schedule to the Civil Procedure Code. This principle is one of giving creditors and beneficiaries every reasonable opportunity to be heard, should they avail themselves of it, but otherwise to secure that they are bound by the administration.

[3] Under the U. P. Encumbered Estates Act the machinery is set in motion by S. 4 at the instance of the landlord. For the purpose of administration a special officer is constituted under S. 3. His first duty under S. 8 is to call on the landlord (inter alia) for a schedule of his proprietary rights in land and against this every creditor-claimant is given an opportunity of filing, and indeed is required to file, under

S. 10 (1) of the Act a counter-version of what the landlord's proprietary interests in land really consist of, if he disagrees with the landlord's own schedule. Section 11 (2) actually deals with quite another class of claim, namely the claims of third parties to the property of the landlord. In terms this sub-section relates to nothing else, and it is only as to the property so claimed that the Special Judge appears to be required to determine whether it is liable to attachment, sale or mortgage. Moreover, under S. 14 (1) of the Act it is noticeable and curious that the Special Judge is required to fix, and give notice of, only the date for enquiring into claims made in pursuance of the notice published in accordance with S. 9, that is to say, the claims of the creditor-claimants. There is no parallel requirement in respect of the claims of third parties made under S. 11 (2). It has been tempting to read this, coupled with the general principles of the administration of assets which I have mentioned above, as some indication that it was the intention of the Legislature that the principles of representation should apply to the U. P. Encumbered Estates Act in the case of claims made by third parties. It has, however, now become the universal practice on the part of Special Judge appointed under this Act to give notice to the creditor-claimants not only in respect of their claims made under S. 9, but also in respect of the claims of third parties made under S. 11 (2). That was actually done in this case, and in response to that notice only the two creditors, Ratan Lal and Debi Prasad, took the trouble to appear before the Special Judge. Curiously enough, it is these men alone who now complain that the appeal is defective on the ground that other creditors are not parties to it. They have themselves nothing to complain of.

[4] For myself I feel some diffidence in assuming that all creditors ought to be treated strictly as "parties" to the proceedings in the sense in which defendants are parties to a regularly constituted suit. I express this view with diffidence, however, as I am aware that there is the authority of learned Judges of this Court to the contrary. I have, nevertheless, been reluctant to apply in all their technicalities the Rules of the First Schedule to the Civil Procedure Code to the proceedings before us under the Encumbered Estates Act and I should have much preferred to regard the creditors merely as persons interested or as beneficiaries as in the more usual forms of the administration of assets such as the administration of trusts, the administration of the estates of deceased persons and the administration of the assets of insolvents. I appreciate, however, that in all these cases representation has been expressly provided for.



[5] There is a great weight of authority particularly in the Oudh Chief Court which takes the opposite and more technical view. It is to the effect that creditors are—and undoubtedly it is true—persons interested in all questions touching the assets under administration, and, as such, are technically parties to the proceedings. In that view of the matter they say they are 'necessary' parties and not mere 'proper' parties to claims made under S. 11 (2) of the Act, since those questions involve the determination of the quantum of the assets in which they are to be entitled to share. That undoubtedly is the strict position if they are to be treated as parties to a suit and governed by the technical Rules of the Civil Procedure Code. But beyond a general inclination to treat an administration under the Encumbered Estates Act on lines similar to other familiar forms of administration, I regret that I cannot find any solid ground for treating the Special Judge, the landlord himself or the creditors who actually appeared, as representatives of the estate in the sense in which a Receiver or an Official Liquidator represents an estate so as to bind all the creditors. In view, therefore, of the weight of authority against me and particularly of the fact that this very question is now pending in the Privy Council, I am constrained with reluctance to agree that the view of my learned brother Pathak J., must be taken for the present to be the right one. I wish it were not so.

[6] **Pathak J.** — This is an appeal from an order of the Special Judge, first grade, Benares, whereby an objection filed by the appellant under S. 11, Encumbered Estates Act, was dismissed. The facts are very short and may be stated as follows: On 24-10-1922, Ram Prasad (since deceased), Bhagwant Das and Radha Raman executed a mortgage in favour of the appellant for a sum of Rs. 1,00,000. In 1933 a contract was entered into between the appellant and the mortgagors to the effect that the mortgagors would transfer, by way of sale, certain properties in full satisfaction of the mortgage money. Upon the failure of the mortgagors to execute the sale deed in accordance with the terms of the said contract, the appellant instituted suit No. 9 of 1934, for the specific performance thereof. The result was that on 19th December 1934 the claim for specific performance was decreed and the mortgagors were directed to execute a sale deed within three months from the date of the decree. Instead of executing the sale deed in accordance with the terms of the aforesaid decree, Bhagwan Das and Choudhari Radha Raman, the two surviving mortgagors, on their own behalf, and as representing their respective sons, made an applica-

tion under S. 4, Encumbered Estates Act, on 31st August 1935. It may be noted in passing that during the pendency of the proceedings under the Encumbered Estates Act, the decree for specific performance in the aforesaid suit was confirmed by this Court on 8th January 1942. In the course of those proceedings the appellant made a claim under S. 11 praying that it might be declared that the properties in respect of which the decree for specific performance had been passed did not belong to the landlords, and, therefore, should not have been shown in the schedule of properties appended to the written statement filed by the latter. It is this claim under S. 11 which has given rise to the present appeal.

[7] It should be mentioned that the learned Special Judge issued notices of the aforesaid claim under S. 11, Encumbered Estates Act to the landlords and to all the creditors. In response to the notices, however, the landlords and only two of the creditors, namely, Ratan Lal and Debi Prasad appeared to oppose the claim under S. 11 and the decree framed in the Court below mentioned the names only of these two creditors in addition to the names of the landlords and the claimant. In the memorandum of appeal filed in this Court, the appellant impleaded only the landlords and the aforesaid Ratan Lal and Debi Prasad, but omitted to implead the remaining creditors.

[8] A preliminary objection has been taken to the hearing of this appeal upon the ground that the appeal was incompetent inasmuch as the creditors, whom the appellant omitted to implead in the appeal, were necessary parties and that without the presence of the said creditors before the Court, no effective decree could be passed in the appeal. The decision of this objection would depend upon the answer to the question as to whether the creditors omitted from the memorandum of appeal were necessary parties. Who is 'a necessary party' has not been defined in the Code of Civil Procedure. But as a result of decided cases it may be laid down that there are two tests by which this question must be determined. Firstly, there must be a right to some relief against such party in respect of the matter involved in the proceedings in question and secondly, it should not be possible to pass an effective decree in the absence of such a party. Applying these tests, I have no doubt that the creditors of a landlord who has claimed relief under the Encumbered Estates Act are necessary parties to the proceedings under that Act. The object of the Act is (1) to compel the landlord to surrender his entire property for the benefit of his creditors and (2) to liquidate the debts of all



the creditors of such a landlord in accordance with, and to the extent permitted by the Act. It is true that the landlord is also a party to the dispute raised by a claim under S. 11. But it is obvious that the main party who is vitally interested in that dispute is the entire body of creditors. The issue which arises out of such a claim is whether the property, which is the subject-matter of the claim, is liable to be availed of in accordance with the provisions of the Act for the satisfaction of the debts due to the entire body of creditors. Could it be suggested that in a suit under O. 21, R. 63, Civil P. C., the decree-holders who desire to seize the property belonging to the judgment-debtor are not necessary parties? The mere fact that the judgment-debtor is also impleaded in such a suit does not affect the question that the real dispute is between the claimant to the property, which is the subject-matter of the suit, and the decree-holder. It has been argued that the creditors are really no parties to the claim under S. 11 as there is no express provision in the Act for issue of notice of such a claim. I have given my anxious consideration to this argument but I find myself unable to accept the same. A perusal of S. 9 of the Act would show that, in addition to the publication of notice in the gazette, and otherwise calling upon the creditors to present written statements of their claims, it is necessary that such notice should be issued to each of the creditors mentioned in the written statement of the landlord. In my opinion, the creditors become parties to the proceedings under the Act after the notices are served upon them and, in any event, after they have filed the written statements of their claims. They continue to be parties to the proceedings until their debts are liquidated or proceedings are terminated in accordance with the provisions of the Act. It is worthy of note that this Court has treated the creditors and the landlord on the same footing as if they were parties to a suit and in cases where the heirs of a deceased creditor have not been substituted, this Court has declared that the application under S. 4, Encumbered Estates Act, abated as against the legal representatives of such deceased creditor. It is true that in general, the proceedings under the Encumbered Estates Act are in the nature of proceedings for the administration of debts under the Companies Acts or the Bankruptcy Acts. But the Legislature has not thought fit to assimilate the Encumbered Estates Act proceedings in all essential particulars to the proceedings under those Acts. No provision has been made in the Encumbered Estates Act for the representation of the creditors by another person and I am constrained to hold that in the proceedings

under the Encumbered Estates Act, the creditors are parties not as beneficiaries represented by some trustee but in their individual capacity. In my judgment, the omission in S. 11 of the provision for the issue of notice to the creditors and the landlords does not affect the matter. If from the nature of the case, the creditors are necessary parties to the proceeding in question, the Court is bound to issue notice to such parties under the ordinary law of procedure.

[9] It has next been contended that only those creditors who contested the claim under S. 11 should be considered to be parties to the proceedings, while the creditors who did not care to intervene or appear in Court should not be so treated. This contention again I am not prepared to accept. The question whether a certain person is a necessary party does not depend upon the inaction or the conduct of such a person, but depends necessarily upon the nature of the proceedings and the interest of the person in question in the subject-matter thereof. It is a matter of common knowledge that sometimes in cases where there is a large number of parties holding interest of a like nature in the same proceedings, only some of those parties raise the contest, while others do not take any active interest in the litigation. In a case of that kind, such parties, who do not enter appearance in Court, do not lose their character as necessary parties by their inaction. I do not find any ground upon which it could be possible to differentiate the case of those creditors who appeared in Court and raised the contest from that of those who did not choose to enter appearance in Court. The interest, in the distribution of the property of such as did not raise any contest would not lapse by their silence. If the decision goes in favour of the claimant each and every creditor has got a right of appeal. Equally if the decision goes against the claimant all the creditors must be impleaded in the appeal filed by the unsuccessful claimant. The appeal is a mere continuation of the original proceeding and if it is clear that all the creditors are necessary parties to the proceedings out of which the appeal has arisen, they must necessarily be so when the litigation reaches the appeal stage.

[10] The question goes to the root of the matter and relates to the constitution of the appeal itself and, therefore, it is immaterial whether the objection is raised at the instance of one who contested the proceedings in the Court below and not at the instance of those who were omitted from the memorandum of appeal. In my judgment, it is open to the respondents in the present appeal to raise the preliminary objection which, in substance, is a



plea that on the appeal, as constituted, no decree could be passed at all by this Court.

[11] Learned counsel for the appellant has also contended that in view of the fact that the decree framed by the Court below does not mention the names of the creditors omitted from the memorandum of appeal, it was not incumbent upon him to have impleaded those creditors. In my judgment, the mere fact that the decree-writer has committed a mistake would not affect the question as to who must, under the law, be impleaded in the appeal. The practice observed by the Courts below in this respect is not uniform. While sometimes the names of only the contesting parties are mentioned, on other occasions, the names of those who have not raised the contest are also mentioned. In any event, the decision of the matter in issue, which is one of substance, cannot be allowed to be affected by the mode of preparation of the decree.

[12] If the reasons given by me above are correct, it necessarily follows that the result of overruling the preliminary objection if the appeal be allowed will be to give rise to two conflicting decrees. On the one hand, there will be a decree passed by this Court which would give the right to the appellant to claim the property and, on the other hand, the creditors who are not before this Court will be entitled to claim that the decree passed by the Court below which they could avail of has remained unaffected by the result of the present appeal. In this sense, it is clear that this Court cannot pass an effective decree in the absence of the creditors who have not been impleaded in the appeal and I have no option but to give effect to the preliminary objection and to hold that the appeal, as framed, is not properly constituted.

[13] It is worth mentioning that the view that I have taken is in consonance with the view taken by the Oudh Chief Court in a current of decisions [see *Rameshwar v. Ajodhia Prasad*] A. I. R. 1941 Oudh 580,<sup>1</sup> [*Bishunath Prasad v. Sarju Saran*] A. I. R. 1942 Oudh 16<sup>2</sup> and [*Lakshmi Narain v. Satgurnath*] A. I. R. 1942 Oudh 339<sup>3</sup> and I have not found a discordant note struck either in this Court or in the Oudh Chief Court. For the reasons stated above, I would uphold the preliminary objection and dismiss the appeal.

[14] Sir Syed Wazir Hasan, on behalf of the appellant, has made an application praying that the creditors omitted from the memorandum

of appeal might now be added thereto and the delay in taking this step might be condoned. I have given my anxious consideration to this aspect of the case but in my opinion, it is not possible to accede to this request. The defect in the appeal was brought to the notice of the appellant a considerable time ago. The controversy upon this question is now sufficiently old and I see no justification for the appellant not taking the safer course to implead all the creditors in the appeal. Apart from the question whether S. 5, Limitation Act, applies to the application made by Sir Syed Wazir Hasan, I do not see any ground for extension of time and to my mind, the delay remains unexplained by any valid reason. In the view that I have taken above, it is clear that the creditors, who are sought to be impleaded now, have acquired a valuable right which accrued to them by lapse of time and I do not see any justification for depriving them of that right. For this reason, I would dismiss the application made on behalf of the appellant.

[15] The question of the costs of this appeal is a matter of some importance. The preliminary objection which I have disposed of was taken before the Division Bench after the conclusion of the arguments by counsel for the appellant on the merits of the appeal. If the preliminary objection had been taken at the proper time, that is, before the arguments on the merits were commenced, much time of the Court would have been saved and possible reference to the Full Bench might have been unnecessary. As this position was brought about by the conduct of the respondents, the proper order, in my opinion, in this case is to deprive the respondents of the costs incurred by them on the hearing of this appeal, that is to say, all costs with the exception of those incurred in translation and printing of the the paper book.

**Verma, J.**—I agree with my brother Pathak.

**Per Curiam.**—The appeal is dismissed. The contesting respondents will get from the appellant the costs incurred by them in translation and printing. The rest of their costs will be borne by them. The appellant will bear its own costs.

D.S./G.N.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 22 [C. No. 13]**

**VERMA AND BIND BASINI PRASAD JJ.**

*Triloki Nath Misra and others — Plaintiffs — Applicants v. Dalsinger Naik — Defendant — Opposite party.*

Civ. Rev. No. 333 of 1944 and Civ. Rev. No. 3 of 1945, De'd on 26-4-1946, against Order of Civil Judge, Basti, D/- 26-2-1944.

1. ('41) 28 A. I. R. 1941 Oudh 580 : 17 Luck. 175 : 195 I. C. 761.

2. ('42) 29 A. I. R. 1942 Oudh 16 : 196 I. C. 482.

3. ('42) 29 A. I. R. 1942 Oudh 339 : 199 I. C. 801.



(a) Civil P. C. (1908), S. 152 — S. 152 does not apply where there is error in principle applied in judgment.

The provisions of S. 152 are attracted only when there is any clerical or arithmetical mistake in judgments, decrees or orders, or errors arising therein from any accidental slip or omission. That section is inapplicable where there is any error in the principle applied in the judgment. [P 24 C 1]

C. P. C. —

(44) Chitaley, S. 152, N. 3.

(b) Civil P. C. (1908), S. 152 — Judgment of Court cannot be corrected on ground that additional argument originally not advanced is subsequently urged before it.

When at the time of the hearing of an appeal a point is not urged by a party and subsequently after the judgment it strikes the party that he might have urged a point before the Court which might have prevailed, and then he makes an application to the appellate Court for correction of the judgment under S. 152, such an application is not maintainable. It is the duty of the parties to lay before the Court all the necessary points in their favour at the time of the hearing of the case and the judgment of a Court cannot be corrected or modified on the ground that any additional argument which was originally not advanced is subsequently urged before it. [P 24 C 1]

C. P. C. —

(44) Chitaley, S. 152, N. 2.

(c) Civil P. C. (1908), O. 34, R. 7 — Preliminary decree for redemption passed — Commissioner can be appointed to take accounts.

Where a Court has passed a preliminary decree for redemption, according to the provisions of O. 34, R. 7, and the form of the preliminary decree for redemption as given in Appendix D to the First Schedule at Serial No. 7a, a commissioner can be appointed to take the accounts of the mortgaged property. [P 24 C 2]

C. P. C. —

(44) Chitaley, O. 34, R. 7, Notes 4 and 14.

A. P. Pandey — for Applicants.

S. S. Srivastava — for Opposite Party.

**B. B. Prasad J.**—This judgment will govern Civil Revision No. 3 of 1945. The material facts are as follows: Triloki Nath and others made an application under S. 12, U. P. Agriculturists' Relief Act, 1934, read with S. 9, U. P. Debt Redemption Act, for the redemption of a usufructuary mortgage dated 15-10-1925, for a sum of Rs. 2,999-15-0. The mortgaged property consisted of 55 bighas 17 biswas 6 dhurs of a certain agricultural plot. The mortgagors' contention was that the entire mortgage money was paid up from the usufruct of the property and that they were entitled to redeem the property without paying anything. Dalsingar, mortgagee, resisted the claim on a number of grounds and *inter alia* he pleaded that the profits were not sufficient to pay off the principal sum of the mortgage money.

[2] On 11-9-1942, the trial Court passed a preliminary decree directing accounts to be taken in accordance with S. 9, U. P. Debt Redemption Act, 1940, and it mentioned in its judgment that the correct mode of accounting was as laid down

by it in its judgment in another Suit No. 775 of 1941. Evidently that was a method to determine profits on the basis of the circle rate of the mortgaged land. The Commissioner submitted his report on 5-11-1942, and adopted the circle rate method. He arrived at the conclusion that a sum of Rs. 249-9-9 only was due to the mortgagee for the mortgage in dispute. There was an objection to the Commissioner's report and the learned munsif after considering the objection maintained the Commissioner's report. In the result he decreed the claim for redemption on 8-2-1943, on payment of Rs. 249-9-9. Against that decree there was an appeal to the District Judge and it came up for hearing before Mr. Maheshwari Dayal, Civil Judge. By the judgment dated 29-11-1943, he dismissed the appeal with costs. Nine days later the mortgagee made an application dated 8-12-1943, purporting to be under Ss. 151 and 152, Civil P. C. The allegations therein were that there have been two mistakes in the judgment of the first appellate Court, namely, that, although the Court had directed that the profits of land should be calculated at the rate of Rs. 14 per bigha per annum and those of the trees at the rate of 8 annas per tree per annum, the same was not kept in view at the time of the judgment. It was pointed out that if the profits were calculated on that basis then, instead of Rs. 249-9-9 a sum of Rs. 1862-2-0 would be found due under the mortgage in dispute. It is necessary to note here that the application did not purport to be one for review of judgment. In fact no court-fee as required by the law for applications of review was paid on this application. This application came up for hearing before Mr. Maheshwari Dayal on 26-2-1944 and he began his order with the following sentence :

"This is an application for review of my judgment in this appeal given on 29-11-1943 on the ground that there is a mistake therein which is apparent on the face of the record."

[3] He remarked in his judgment that it was his practice never to allow in proceedings under S. 12 or S. 33, Agriculturists' Relief Act profits at more than Rs. 15 per bigha per annum and that he never intended to award a higher rate in the appeal decided by him on 29-11-43. Finding that the trial Court in the suit had allowed profits at a rate which worked out at more than Rs. 15 per bigha per annum, he modified his previous order so as to reduce the profits of the mortgaged land to Rs. 15 per bigha per annum.

[4] The mortgagor makes an application in revision against the order dated 26-2-1944, and assails it on the ground that the learned Civil Judge had no jurisdiction to modify his



previous order under the provisions of ss. 151 and 152, Civil P. C. That is Revision No. 333 of 1944. The mortgagee also makes an application in revision against the judgment dated 29-11-1943, and contends in substance that really the basis of calculation of the profits should be the occupation rent and not the circle rate system adopted in the trial Court.

[5] We take up first Revision No. 333 of 1944. The first error in the order dated 26-2-1944, passed by the learned Civil Judge is that he was under the impression that there was an application for review before him. No such application was made before him by the mortgagee. As has already been pointed out above, the necessary court-fee was not deposited by him. It is doubtful whether or not an application for review was maintainable in the circumstances of the case, but it is unnecessary for us to go into that point when the mortgagee himself did not purport to make any application for review.

[6] The second point is that s. 152, Civil P. C. is not applicable. The provisions of that section are attracted only when there is any clerical or arithmetical mistake in judgments, decrees or orders, or errors arising therein from any accidental slip or omission. That section is inapplicable where there is any error in the principle applied in the judgment. From a perusal of the judgment dated 29-11-1943, delivered by the learned Civil Judge it will be seen that the points made out by the mortgagee in his application dated 8-12-1943, were not urged before him. There is nothing in the judgment dated 29-11-1943, to show that learned counsel for the mortgagee appellant argued before the learned Civil Judge that the profits allowed by the trial Court worked out at more than Rs. 15 per bigha per annum. We express no opinion as to the propriety of the learned Civil Judge adopting a rule of thumb to allow only Rs. 15 per bigha per annum irrespective of the quality of the land but we must point out that when at the time of the hearing of an appeal a point is not urged by a party and subsequently after the judgment it strikes the party that he might have urged a point before the Court which might have prevailed, and then he makes an application to the appellate Court for correction of the judgment under s. 152, Civil P. C., such an application is in our opinion not maintainable. It is the duty of the parties to lay before the Court all the necessary points in their favour at the time of the hearing of the case and the judgment of a Court cannot be corrected or modified on the ground that any additional argument which was originally not advanced is subsequently urged before it. We are of opinion that the learned Civil Judge was not

justified in modifying the judgment dated 29-11-1943, by the order dated 26-2-1944. Civil Revision No. 333 of 1943 should, therefore, be allowed.

[7] We pass on now to consider Civil Revision No. 3 of 1945 brought by the mortgagee. The point urged on his behalf is that the learned Munsif was not right in appointing a Commissioner to determine the profits of the mortgaged property. The first point to be noted in this connection is that no such plea was taken by the mortgagee before the appellate Court and this point is being urged for the first time in revision. Secondly, it is to be noted that the appointment of the Commissioner in the present case was certainly not illegal. Learned Munsif passed a preliminary decree for redemption and according to the provisions of O. 34, R. 7, Civil P. C. and the form of the preliminary decree for redemption as given in Appendix D to Sch. 1, at Serial No. 7a, a Commissioner could be appointed to take the accounts of the mortgaged property. We see no force in this contention. In the result Civil Revision No. 3 of 1945 is dismissed with costs and Civil Revision No. 333 of 1944 is allowed with costs and the order dated 26-2-1944, passed by the learned Civil Judge is set aside.

D.S/D.H.

*Order accordingly.*

**A. I. R. (34) 1947 Allahabad 24 [C. No. 14.]**  
BRAUND J.

*Pahlad Rai and others — Defendants — Applicants v. Jai Narain Mehra — Plaintiff — Opposite party.*

Civil Revn. No. 320 of 1945, Decided on 4-4-1946, from order of Sm. C. C. Judge, Meerut, D/- 20-12-1944.

Provincial Small Cause Courts Act (1887), S. 25 — Question of fact gone into by Judge — Fact that it is not mentioned in judgment is of no significance — High Court will not interfere in revision.

Where the evidence makes it clear that a question of fact was gone into by the Judge, no significance can be attached, in a Small Cause Court matter, to the fact that the Judge has not actually mentioned it in his judgment and if the High Court is satisfied that the Judge did consider the facts, the High Court will not in revision review a decision of fact by the Small Cause Court Judge. [P 25 C 1]

C. P. C. —

(44) Chitale, S. 115, N. 29, pt. 7.

(41) Mulla, p. 428, Note "Provincial Small Cause Courts Act".

J. N. Chatterji — for Applicants.

R. B. Jaini — for Opposite party.

**Order.**—This is not a case in which I feel I can interfere. It is a Small Cause Court matter concerning the purchase of nets. It is a very simple matter. The plaintiff alleged that the defendants made a contract with him to make certain nets. He says he made them and



now he claims to be paid for them. The only contest was where the contract was made. The plaintiff says it was a verbal contract made at Meerut; whereas the defendants said that it was not anything of the kind but was a written contract made at Delhi.

[2] It has to be admitted that on the facts of his judgment the Judge has not dealt with the matter at all fully. In point of fact, he has not even mentioned this question of which of them was telling the truth about the place where the contract was made. But if one reads the evidence, as I have done, it is as clear as anything can be that it was raised as a question of fact whether this transaction was governed by a contract made at Meerut or a contract made at Delhi. The plaintiff alleged quite positively that there were two contracts, one at Meerut and the other at Delhi, and that what the defendants were doing was that they were trying to muddle up the one with the other. The evidence makes it clear that this question was gone into and I cannot, therefore, in a Small Cause Court matter attach any significance to the fact that the Judge has not actually mentioned it in his judgment. What the Judge has decided in this judgment is that a certain amount of money was payable.

[3] I am satisfied that the Judge did consider the facts and that being so, I am not here in revision to review a decision of fact by the Small Cause Court Judge. A comment is made, quite justifiably, that the judgment was not written for six weeks after the hearing. There may of course, be some explanation which I know nothing about. I feel in the circumstances that I must dismiss this revision with costs.

V.R./D.H.

*Revision dismissed.*

**A. I. R. (34) 1947 Allahabad 25 [C. N. 15]**

**IQBAL AHMAD C. J. AND SINHA J.**

*Hanuman Prasad Misra and others — Defendants — Appellants v. Sm. Yeshoda Kuwari Debi—Plaintiff—Respondent.*

Second-Appeal No. 2301 of 1943, Decided on 18-10-1945, from order of Civil Judge, Mirzapur, D/-16-5-1942.

**Hindu Law**—On death of *T*, his widow *R* executing agreement with *B* brother of *T* who was separate, thereby acknowledging rights of *B* as owner of property — *B* in course of administration granting leases for building purposes — Lessees constructing substantial buildings—After death of *R* one of her daughters *N* bringing suit against *B* for possession of property—Lessees not made parties—Subsequent suit by another daughter *Y* for similar reliefs—Lessees made parties — Widow held could enter into agreement with *B* and transaction of leases was within competence of *B*—Lessees were entitled to benefit of estoppel and compensation — O. 2, R. 3, Civil P. C., applied.

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*T* and *B* were brothers who were separate. On the death of *T*, his widow *R* who had acquired the usual rights of a Hindu widow executed an agreement whereby she acknowledged the rights of *B* as the owner of the property as the surviving of the two brothers of a joint Hindu family. *B* came into possession and in the course of his administration of the estate he granted a lease of the different portions of the land in favour of a number of lessees for building purposes. The lessees made substantial constructions. After the death of the widow, one of her daughters *N* brought a suit against *B* for possession of the property on the ground that her father and *B* were separate and her mother *R* had no right to enter into the agreement. To this suit the lessees were not made parties. Subsequently the other daughter *Y* brought a suit for possession and the removal of the constructions. To this suit, besides the lessees, she cited her sister *N* as a defendant.

**Held**—(1) that assuming that the widow could not come to an arrangement with *B* which could enure beyond her lifetime or permanently imperil the interests of the reversioners, she could in the course of the management of her husband's estate do something which the prudent conduct of the management required. This might not, strictly speaking, be either benefit to the estate or legal necessity. It was something which was implicit in the right of everyone in charge of an estate, be he or she a full or limited owner: ('20) 7 A.I.R. 1920 All. 345, *Rel. on.* [Para 4]

(2) that the transaction in dispute was one within the competence of *B* as a transferee from the widow. [Para 5]

(3) that it is true that there is normally speaking no estoppel in a transaction by a Hindu widow. But this was not a normal case. The lessees were not dealing with a Hindu widow; they were dealing with the brother of the last male owner in whose favour there was a presumption that he was joint with his brother. The case was therefore a clear case of estoppel and the lessees were entitled to its benefits. [Para 6]

(4) that as the estate was benefited by the transaction the lessees were entitled to compensation. ('43) 30 A.I.R. 1943 P. C. 29, *Rel. on.* [Para 7]

(5) that the cause of action in both suits was just the same. It was the transfer by the widow to *B* and the resultant transfers by *B* to the lessees. In the first suit by *N* the lessees could have been made parties. O. 2, R. 3, Civil P. C. had therefore application to the case. [Paras 7 & 8]

*R. N. Gurtu and Man Singh*—for Appellants.

*C. B. Agarwala and K. L. Misra*—for Respondent.

**Sinha J.** — This is an appeal by the defendants in an action for possession and removal of certain constructions. The property in dispute is an area of land split into several parcels. The facts are briefly these: One Thakur Prasad Dube was the owner of this property. On his death, in 1907, his widow, Mt. Rajwanti, acquired the usual rights of a Hindu widow. Soon after, in the same year, Mt. Rajwanti and one Bansidhar Dube, the brother of Thakur Prasad Dube, executed an agreement whereby the lady acknowledged the rights of Bansidhar as the owner of the property as the surviving of the two brothers of a joint Hindu family. Bansidhar came into possession and his name was mutated in the revenue papers. In the course of his administration of the estate, he granted a lease of the different



portions of the land in favour of a number of people including the present defendant-appellants, for building purposes. The lessees have made substantial constructions. Mt. Rajwanti died on 20-5-1935, leaving two daughters, Mt. Naurangi and Mt. Yashoda Devi. Naurangi was, as an indigent daughter, entitled to the whole estate under the Hindu Law in preference to her sister, Yashoda. She brought a suit, suit no. 11 of 1935, in the Court of the Civil Judge of Mirzapur against Bansidhar for possession of the property on the ground that her father and Bansidhar were separate and her mother had no right to enter into the agreement. She was at all events a limited owner and the agreement exhausted itself with her death. To this suit the present defendants were not parties. It was decreed on 29-1-1936, and she obtained possession on 26-2-1936. On 26th of April, i. e. within two months, the two sisters entered into an agreement whereby Naurangi recognized the right of Yashoda to the extent of a half. The latter claimed to be in charge of the entire estate under a subsequent arrangement of 3-5-1940, although the plaint continues, the relations between the two sisters became sometime later strained. The present suit was instituted in the year 1941 by Yashoda for the reliefs mentioned above. To this suit, besides the lessees, she cited her sister, Naurangi, as a defendant.

[2] The defence, in the main, was that it was Thakur Pd. himself who had granted the lease to the defendants and that, even if that case failed, Bansidhar was joint with his brother and he was entitled to take the step which he did. It was also pleaded that, even if the two brothers were separate, Mt. Rajwanti was within her rights in coming to an arrangement, for the management of the estate, with Bansidhar and that the latter was, in his turn, within his rights to grant the lease, as it was for the benefit of the estate. The bar of estoppel was also pleaded. The bar of limitation as also of O. 2, R. 2, Civil P. C., was again pleaded. And, lastly, it was pleaded that the defendants were, in any case, entitled to compensation. The learned Munsif found that the defendants had failed to establish that they had been let into possession by Thakur Prasad himself. He found that the two brothers were separate. But he came to a distinct finding that it was open to the lady to enter into such an arrangement with Bansidhar and the latter was within his rights to enter into the transaction with the defendants, inasmuch as it was for the benefit of the estate. He found that the defendants were entitled to compensation. The house of Bhagwan was, according to him worth Rs. 700, that of Harihar Dube worth Rs. 600, of Mahadeo worth Rs. 1, 500, of defendants 2 and 3 worth

Rs. 500, of Basudeo worth Rs. 300 and of Hanuman worth Rs. 4,000. On finding that the arrangement was for the benefit of the estate he dismissed the suit with costs.

[3] The plaintiff went in appeal. The learned Civil Judge, while agreeing with the finding of the learned Munsif that the defendants had not been let into possession by Thakur Pd., disagreed with him in his view that the transaction was within the competence of Mt. Rajwanti or of Bansidhar or that the defendants were entitled to any compensation. He held that there could be no question of estoppel in the circumstances of the case. He granted an unconditional decree in favour of the plaintiff. It might be mentioned that the plaintiff had claimed mesne profits, but this relief was refused by the learned Civil Judge. The defendants have come here in second appeal and the plaintiff has filed a cross-objection with regard to the mesne profits.

[4] On the findings we must take it that Bansidhar and Thakur Prasad were separate. We must also take it that the defendants were not let into possession by Thakur Prasad. We, however, find that the real question as regards the right of Mt. Rajwanti to enter into an arrangement with Bansidhar and the latter's right to grant the lease in favour of the defendants has been obscured by the way the Courts below have approached this question. We might, however, say that, as it is, the learned Munsif was, as it seems to us, correct and the learned Civil Judge was wrong. It was not a case, strictly speaking, of benefit to the estate or legal necessity. Assuming that the lady could not come to an arrangement with Bansidhar, which could enure beyond her life-time or permanently imperil the interests of the reversioners, she could, in the course of the management of her husband's estate, do something which the prudent conduct of the management required. This may not, strictly speaking, be either benefit to the estate or legal necessity. It is something which is implicit in the right of everyone in charge of an estate, be he or she a full or a limited owner. The case in *Pahalwan Singh v. Jiwan Das*, 18 A. L. J. 41<sup>1</sup> though it does not go the whole length with the present case, is certainly an authority for the proposition before us.

[5] The learned Munsif has distinctly found that the annual ground-rents payable by the lessees are far in excess of the rents which used to be paid by the tenant or tenants, who were in occupation of this land. The learned Civil Judge has held that the land has been permanently lost to the reversioners and an ar-

1. (20) 7 A. I. R. 1920 All. 345 : 42 All. 109 : 59 I. C. 162 : 18 A. L. J. 41.



rangement of this character could not be for the benefit of the estate. This, in our opinion, is not the correct approach to this question. In the first place, the land has not been permanently lost to the estate. There is still a right of re-entry. There is the ground-rent, payable annually. We, therefore, think that the transaction in dispute was one within the competence of Bansidhar as a transferee from the lady.

[6] On the question of estoppel, we again feel that the learned Munsiff was right and the learned Civil Judge went astray. It is true that there is normally speaking, no estoppel in a transaction by a Hindu widow, but this was not a normal case. Thakur Prasad and Bansidhar were brothers. There was a strong presumption of Hindu Law that they were joint. The admission by the lady might have led the lessees into an honest belief that the recital in the agreement represented the truth and the brothers were really joint. It was not the lady herself who had granted the lease; it was Bansidhar. The view of law that there is no estoppel in a transaction by a Hindu widow proceeds, to our mind, upon the principle that everybody knows that a Hindu widow has limited rights. That important element is lacking in the present case. The lessees were not dealing with a Hindu widow; they were dealing with the brother of the last male owner in whose favour there was a presumption that he was joint with his brother and that presumption was further reinforced by the recitals in the agreement. The case was, therefore, a clear case of estoppel and the defendants are entitled to its benefits.

[7] On the question of compensation we think, here again, the learned Munsiff is right and the learned Civil Judge is wrong. After the decision of the lower appellate Court, there has been a pronouncement of their Lordships of the Judicial Committee in [Mohan Manucha v. Manzoor Ahmed Khan] 1943 A. L. J. 421.<sup>2</sup> It is true that, in one very important particular, the present case differs from the case before their Lordships. There the person entering into the transaction had a right to the estate, although he suffered from a disability; here the person dealing with the estate had, in the events which have happened, no title to it. But the ratio of their Lordships' decision appears to be the ratio in [Butler v. Rice] (1910) 2 Ch. 277.<sup>3</sup> If the finding of the learned Munsiff is correct—as we have held that it is that the estate has benefited by this transaction, there can be no doubt that the

principle laid down in that case has full application to the facts of the present case. There is yet another aspect of the case which has escaped the attention of the Courts below by reason perhaps of the wrong pleadings. The plea of O. 2 R. 2, was raised on the basis of the earlier litigation, when Mt. Naurangi had brought a suit for possession against Bansidhar. This may or may not be so, but we do feel that O. 2, R. 3, if not O. 2, R. 2, Civil P. C., has application to the facts of the case. It says.

“(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit”.

[8] The cause of action in both cases was just the same. It was the transfer by the lady to Bansidhar and the resultant transfers by Bansidhar to the lessees. The lessees derived their title from him. In that action the present defendants could have been cited as party and the case in [Parbati Kunwar v. Mahmud Fatima] 29 ALL. 267,<sup>4</sup> is authority for this proposition. No other point was argued. We, therefore, allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs in all Courts. The cross-objection is dismissed with costs.

D.S./D.H.

*Appeal allowed.*

4. (1907) 29 All. 267.

**A. I. R. (34) 1947 Allahabad 27 [Case No. 16.]**  
FULL BENCH

IQBAL AHMED C. J., VERMA, YORKE, MALIK  
AND SINHA JJ.

*Bharat Singh—Appellant v. Mt. Chadi and another—Respondents.*

Execution First Appeal No. 1 of 1943, Decided on 7th May 1946, from order of 2nd Civil Judge, Meerut, D/- 1st June 1942.

(a) U. P. Temporary Postponement of Execution of Decrees Act (10 [X] of 1937), S. 6 — Object of Act is not to provide relief to monied people purchasing property subject to encumbrance — Purchaser of part or whole of mortgaged property subject to pre-existing mortgage cannot invoke its benefit.

U. P. Act 10 of 1937 is not intended to provide relief to monied people who purchase properties subject to encumbrance with a stipulation that they would be liable to discharge that encumbrance. Cl. (c) of S. 6 of the Act was enacted to hold a subsequent transferee to his bargain and to ensure that he would discharge the mortgage debt according to the covenant in the deed of transfer. Therefore, a purchaser of the whole or a part of the mortgaged property, who has purchased the property subject to a pre-existing mortgage,

2. (1943) 30 A. I. R. 1943 P. C. 29 : 18 Luck 130 : I. L. R. 1943 Kar. P. C. 19 : 70 I. A. 1 : 206 I. C. 457 : 1943 A. L. J. 421 (PC).

3. (1910) 2 Ch. 277 : 79 L. J. Ch. 652 : 103 L. T. 94.



cannot invoke to his aid the benefit of the provisions of Act 10 of 1937 : ('43) 30 A. I. R. 1943 All. 316 (F. B.), *Rel. on.* [Para 9]

(b) Interpretation of Statutes—Courts are bound to give effect to clear words of statute irrespective of actual result thereof—Literal construction leading to absurdity or inconsistency—Words capable of another construction—Construction contrary to literal meaning may be adopted.

It is a well recognised canon of construction of statutes that, when the language of the enactment is clear, the Court is bound to give effect to it even though the Court is satisfied that the legislature did not contemplate the actual result of the language employed, but it is also equally well established that a statute may be construed contrary to its literal meaning when a literal construction would result in an absurdity or inconsistency, and the words are capable of another construction which will carry out the manifest intention : (1881) 17 Ch. D. 746, *Rel. on.* [Para. 10]

C. P. C. — ('44) Chitaley, Preamble N. 7, Pts. 6, 11 and 40.

(c) U. P. Temporary Postponement of Execution of Decrees Act (10 [X] of 1937), S. 6 (c) — 'Transferee'—Word is used in restricted sense as including only purchaser and not in wider sense so as to include mortgagee.

The word 'transferee' occurring in S. 6 (c) is no doubt a word of wide import but the context in which it occurs in the section points to the conclusion that the word is used by the Legislature in the restricted sense as denoting a purchaser or a transferee out and out and not in its wider sense as embracing a mortgagee or lessee as well. The phrase 'subsequent transferee' is preceded by the words 'in the hands of a'. In the case of a mortgagee the property mortgaged does not pass wholly in the hands of the mortgagee. The property, on the other hand, is, from the date of the mortgage, split up into two parcels of distinct interests, one of which becomes vested in the mortgagee and the other remains with the mortgagor, and thus, in the eye of law, the property is in the hands not only of the mortgagee but in the hands of both the mortgagor and the mortgagee. The words 'in the hands of a subsequent transferee' are thus wholly inappropriate to the case of a mortgagee and are applicable only to a person in whom the property has vested absolutely by the subsequent transfer. [Para. 11]

(d) Transfer of Property Act (1882), S. 58 — Mortgage is merely transfer of interest in specific immovable property and not absolute transfer.

A mortgage is no more than the transfer of an interest in specific immovable property. On the execution of a mortgage two distinct interests in the mortgaged property are carved out, viz. (1) the mortgagee's right and (2) the right to redeem. The latter right remains vested in the mortgagor. [Para. 11]

T. P. Act — ('45) Chitaley, S. 58, N. 4, Pts. 2 and 3.

(e) U. P. Temporary Postponement of Execution of Decrees Act (10 [X] of 1937), S. 6 — Notwithstanding repeal by U. P. Act (13 [XIII] of 1940), decree-holder is entitled to exclude period during which former Act was in force in computing limitation for execution of his decree.

Per *Malik J.*—Though S. 5 or S. 6, U. P. Act, 10 of 1937 might have been repealed by U. P. Act, 13 of 1940 on the date when the application for execution was filed, in computing the period of limitation for the application for execution the period during which the decree-holders were prevented from executing their decree by the U. P. Act, 10 of 1937 must be excluded. ('42) 29 A.I.R. 1942 All. 396 (F.B.), *Foll.* [Para. 19]

(f) U. P. Temporary Postponement of Execution of Decrees Act (10 [X] of 1937), S. 6 (c) — 'Mortgaged property' means entire property.

Per *Malik J.*—The words 'mortgaged property' in S. 6 mean the entire mortgaged property and not merely any portion of it. [Para. 19]

*N. C. Vaish* — for Appellant.

*K. C. Mital* — for Respondents.

**Iqbal Ahmad C. J.** — This is a judgment-debtor's execution first appeal and arises under the following circumstances :

[2] On 14-12-1922, Bharat Singh, appellant executed a simple mortgage in favour of the decree-holder respondents, Mt. Chaoli and Mt. Anar Dei. The property mortgaged was zamin-dari land measuring 82 bighas and odd.

[3] Thereafter, on 20-1-1930, Bharat Singh executed a usufructuary mortgage in favour of one Ram Chandar Sahai who is not a party to the present appeal. The property mortgaged under this deed was 76 bighas and odd out of 82 bighas and odd covered by the simple mortgage of 1922. Out of the consideration of the deed of usufructuary mortgage, Bharat Singh left a sufficient amount in the hands of Ram Chandar Sahai with the direction that the latter should pay up and redeem the mortgage of 1922. Ram Chandar Sahai, however, did not pay any portion of the amount due on the mortgage of 1922 with the result that the decree-holder respondents put the mortgage of 1922 into suit and obtained a preliminary decree for sale on 15-1-1935. Bharat Singh, his 2 sons and Ram Chandar Sahai were defendants to the suit for sale. The decree-holder respondents obtained a final decree for sale on 19-2-1938.

[4] In the meantime, on 1-1-1938, the Temporary Postponement of Execution of Decrees Act (X of 1937) — hereinafter referred to as Act, X of 1937 had come into force. It is common ground that Bharat Singh and his 2 sons were agriculturists within the meaning of the said Act and that the annual land revenue payable by them was less than Rs. 250. The provision of S. 3 (1) of the Act which directs stay of execution of decrees during the period that the Act shall remain in force was, therefore, applicable to the final decree for sale held by the decree-holder respondents. It is also an admitted fact that the land mortgaged under the deed of simple mortgage was, in view of the provisions of S. 17 (1) (a), Debt Redemption Act (XIII of 1940), "protected land".

[5] On 3-2-1942, the decree-holder respondents applied for execution of the decree impleading all the judgment-debtors. The prayer contained in the application was that a self-liquidating mortgage be executed in favour of the decree-holders with respect to the entire land covered



by the mortgage of 1922. This prayer was in pursuance of proviso 2 to S. 17 (1), Debt Redemption Act. A note was appended to the application for execution to the effect that, as the judgment-debtors were agriculturists within the meaning of Act X of 1937, the decree-holders were entitled, in the computation of the period of limitation for the application for execution, to exclude the time during which the Act was in force. The judgment-debtors contested the application for execution on the ground that the same was barred by limitation. This contention of the judgment-debtors was overruled by the Court below with the result that Bharat Singh has filed the present appeal. It is to be noted that Ram Chandar Sahai, the usufructuary mortgagee, has not assailed the decision of the Court below and is not a party to the present appeal.

[6] Section 5 (1) (b) of Act X of 1937 enacts that in the computation of the period of limitation for the execution of such decree as is referred to in S. 3, and not covered by S. 6, "the period during which this Act shall remain in force, shall be excluded." It is not disputed that the decree held by the respondents falls within the purview of S. 3 of the Act, and, as such *prima facie*, the decree-holders were entitled, in the computation of the period of limitation, to exclude the period during which Act, X of 1937 was in force. The Act was in force from 1-1-1938 to 31-12-1940, and if this period is to be excluded, the application for execution, which was presented on 3-2-1942, is well within time.

[7] Reliance is, however, placed by the appellant on the words "and not covered by S. 6" that find a place in S. 6 (1) (b) of the Act. It is maintained by the appellant's counsel that the decree in question is covered by S. 6 and, therefore, the period during which the Act remained in force cannot be excluded in the computation of the period of limitation. The relevant portion of S. 6 is as follows:

"Nothing herein contained shall . . . . . (c) apply to a mortgage decree sought to be executed by sale of the mortgaged property in the hands of a subsequent transferee who has taken the transfer subject to the mortgage on the basis of which such decree has been obtained."

[8] It is argued that, as the bulk of the mortgaged property had been transferred to Ram Chandar Sahai and as he had taken the transfer subject to the simple mortgage of 1922 that culminated in the final decree for sale, the decree was a decree covered by S. 6.

[9] It was held by a Full Bench of this Court in [Radha Kishan v. Umrai Singh] 1943 A. L. J. 333,<sup>1</sup> that Act 10 [X] of 1937 is not intended to provide relief to monied people who purchase

properties subject to encumbrance with a stipulation that they will be liable to discharge that encumbrance and that cl. (c) of S. 6 of the Act was enacted to hold a subsequent transferee to his bargain and to ensure that he would discharge the mortgage debt according to the covenant in the deed of transfer. It cannot, therefore, be disputed that a purchaser of the whole or a part of the mortgaged property, who has purchased the property subject to a pre-existing mortgage, cannot invoke to his aid the benefit of the provisions of Act, 10 [X] of 1937. The learned counsel for the appellant, however, proceeds further and maintains that the legislature has denied not only to a subsequent purchaser but to all subsequent transferees of mortgaged property, who have taken the transfer subject to the mortgage with which the property is encumbered, the benefit of the provisions of the Act. In this connection he places reliance on the word "transferee" used in cl. (c), S. 6 of the Act and contends that as Ram Chandar Sahai, the usufructuary mortgagee, was a "transferee" of a part of the mortgaged property, the decree was covered by S. 6 (c). I am unable to agree with this contention.

[10] It is no doubt a recognized canon of construction of statutes that, when the language of the enactment is clear, the Court is bound to give effect to it even though the Court is satisfied that the legislature did not contemplate the actual result of the language employed, but it is also equally well established that a statute may be construed contrary to its literal meaning when a literal construction would result in an absurdity or inconsistency, and the words are capable of another construction which will carry out the manifest intention; vide *Ex parte Walton* : In re Levy (1881) 17 Ch. D. 746.<sup>2</sup>

[11] The word "transferee" is, no doubt, a word of wide import and embraces not only a purchaser, but a donee, a mortgagee or a lessee as well. But the context in which the word "transferee" occurs in S. 6 (c) does, to my mind, point to the conclusion that that word was used by the legislature in a restricted sense as denoting a purchaser or a transferee out and out and not in its wider sense. The phrase "subsequent transferee" is preceded by the words "in the hands of a". Now, in the case of a mortgage, it would be wholly inappropriate to say that the property mortgaged wholly passes into the hands of the mortgagee. A mortgage is no more than the transfer of an interest in specific immoveable property. On the execution of a mortgage two distinct interests in the mortgaged property are

1. ('43) 30 A.I.R. 1943 All. 316 (318) : I. L. R. (1943) All. 824 : 208 I. C. 632 : 1943 A. L. J. 333 (F.B.).

2. (1881) 17 Ch. D. 746 (756) : 50 L. J. Ch. 657 : 45 L. T. 1 : 30 W R 395.



carved out, viz., (1) the mortgagee's right, and (2) the right to redeem. The latter right remains vested in the mortgagor. In the case of a mortgage, therefore, the property mortgaged does not pass wholly "in the hands of" the mortgagee. The property, on the other hand, is, from the date of the mortgage, split up into two parcels of distinct interests one of which becomes vested in the mortgagee and the other remains with the mortgagor. It follows that on the execution of a mortgage the mortgaged property, in the eye of law, is in the hands not only of the mortgagee but in the hands of both the mortgagor and mortgagee. The words "in the hands of a subsequent transferee" are, therefore, wholly inappropriate to the case of a mortgage and, in my judgment, are applicable only to a person in whom the property has vested absolutely.

[12] There is yet another consideration that points to the same conclusion. A prior mortgagee, who has obtained a decree for sale against the mortgagor and a subsequent mortgagee, does, in execution of his decree, sell not only the interest of the subsequent mortgagee but also the interest of the mortgagor in the mortgaged property. In other words, the execution of a prior mortgage decree entails the sale of the mortgaged property which is in the hands both of the mortgagor and the subsequent mortgagee. Clause (c) of S. 6 of Act 10 of 1937 is, however, confined in its operation to a decree that is executed by sale of the mortgaged property in the hands of a subsequent transferee alone. It is, therefore, manifest that it can have no application to a case where the subsequent transferee is a mere mortgagee.

[13] Again the words "in the hands of" are wholly inappropriate to the case of a simple mortgagee. By virtue of a usufructuary mortgage, the property mortgaged does, in one sense, pass into the hands of the usufructuary mortgagee. This is, however, not so in the case of a simple mortgage. The word "transferee" in S. 6 (c) cannot, therefore in the context in which it occurs, be applicable to a simple mortgagee. It would, therefore, be anomalous to hold that that word is applicable to a usufructuary mortgagee. If the word "transferee" was used by Legislature to denote a mortgagee, it should embrace both a usufructuary and a simple mortgagee. As that word cannot, in view of the wording of the section, be interpreted to include a simple mortgagee, it must be held that the Legislature did not intend that word to denote a mortgagee of any description.

[14] For the reasons given above, I hold that the word "transferee" in S. 6 (c) has been used in the limited sense of a person who has purchased the mortgaged property. The decision of

the Court below is, therefore, perfectly correct, and I would dismiss this appeal with costs.

[15] **Verma J.** — I agree.

[16] **Yorke J.** — I agree.

[17] **Sinha J.** — I agree.

[18] **Malik J.**—The facts of this case are set out in the judgment of his Lordship the Chief Justice. The only point for determination is whether the application for execution filed on 3-2-1942, was beyond time. The decree-holders have in this application asked for a self-liquidating mortgage to be executed in their favour of the entire 82 bighas, 8 biswas and 10 biswansis. This they have evidently done as they were no longer entitled to ask for sale of the property by reason of S. 17, U. P. Debt Redemption Act (XIII of 1940). The final decree for sale was passed on 19-2-1938. The decree-holders urge that limitation is saved as they could not have executed their decree during the period when the United Provinces Temporary Postponement of Execution of Decrees Act (X of 1937) was in force. The reply of the judgment-debtor to that contention is that the decree could have been executed while that Act was in force and therefore the period of limitation was not saved. The only point for consideration, therefore, is whether the decree could have been executed while the Temporary Postponement of Execution of Decrees Act was in force. Under S. 5 of that Act, limitation prescribed by the Indian Limitation Act, 1908, for execution of such decrees as are referred to in S. 3 of Act against an agriculturist is extended and the period during which the Act remained in force is excluded. It is common ground that the defendant judgment-debtor is an agriculturist. It is also clear that the decree under execution is a decree such as is mentioned in S. 3 of the Act, being a decree for sale against an agriculturist. Under S. 5 the period is, however, not extended if the decree is covered by S. 6 of the Act. The only relevant provision in S. 6 which is said to apply to this case is S. 6 (c) which reads as follows :

"Nothing herein contained shall . . . . . apply to a mortgage decree sought to be executed by sale of the mortgaged property in the hands of a subsequent transferee who has taken the transfer subject to the mortgage on the basis of which such decree has been obtained."

[19] As I have already said, the application for execution was filed on 3-2-1942, and therefore at that time neither S. 5 nor S. 6, Temporary Postponement of Execution of Decrees Act was in force, that Act having been repealed by Act XIII of 1940, the U. P. Debt Redemption Act. Though S. 5 or S. 6 of the Act may have been repealed on the date when the application for execution was filed, in computing the period of



limitation for the application for execution the period during which the decree-holders were prevented from executing their decree must be excluded. This point has now been set at rest by the decision of a Full Bench of this Court in [Radhey Lal v. Roop Ram], 1942 A. L. J. 571.<sup>3</sup> It is, therefore, necessary to consider whether the decree-holders could or could not execute their decree. It is argued on behalf of the judgment-debtor that because after the date of the mortgage in favour of the decree-holders the mortgagor had executed a usufructuary mortgage of 76 bighas out of 82 bighas 8 biswas and 10 biswansis included in the first mortgage, the mortgage property or at any rate a part thereof must be deemed to have been in the hands of a transferee. One of the questions that has arisen for consideration is whether the mortgaged property in such cases means the entire mortgaged property or only a part thereof. If we were to hold that it means a part of the mortgaged property, the difficulty that may arise is as to where to draw a line. The decree-holders have a right to proceed against the entire mortgaged property. It is true that they can, if they so want, give up a portion of their security, but they cannot be compelled, nor are they expected, to confine their claim to a portion of the mortgaged property in the absence of any statutory provision to that effect. There can be no doubt that to the extent of the 6 bighas odd that were not transferred the mortgagee decree-holders were not entitled to proceed against that property by way of sale. Under the circumstances it cannot be said that the decree became barred by limitation as regards a part of the property and was not so barred as regards the rest of it. I am, therefore, inclined to the view that the mortgaged property means the entire mortgaged property and not merely any portion of it.

[20] Apart from this, there is the further question whether it can be said, in the circumstances of this case, that the mortgaged property was 'in the hands of a transferee.' It cannot be seriously urged that if a mortgagor had executed two simple mortgages the decree-holder on the basis of the first mortgage could claim the right to execute his decree even though the judgment-debtor was an agriculturist entitled to the benefit of the Temporary Postponement of Execution of Decrees Act, on the ground that the property was 'in the hands of a transferee,' the second mortgagee. In the case of a usufructuary mortgage, it is true the actual physical possession of the fields is with the usufructuary mortgagee, but, to my mind, the Legislature was not dealing with the question of the actual

physical possession but with the question of the legal rights of the parties. It could not be said that the property that had been mortgaged to the first mortgagee and which was to be sold in execution of the decree was in the hands of the second mortgagee. After the first mortgage the mortgagor remained the owner of the property and only certain rights in the property had passed to the first mortgagee. After the second mortgage, though it was a usufructuary mortgage, the mortgagor still remained the owner of the property but some more rights were carved out in favour of the second mortgagee. The second mortgagee could never claim that the property which had been mortgaged to the first mortgagee and which was liable to sale in execution of his decree had at any stage come 'to the hands of' the second mortgagee. In this view of the matter also, the judgment-debtor's appeal must fail.

[21] For the reasons given above I would dismiss this appeal with costs and uphold the order passed by the Court below.

**By the Court:**— The appeal is dismissed with costs.

D.R./D.H.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 31 [C. No. 17]**

YORKE J.

*Mt. Sukhdei — Plaintiff — Appellant v. Lachhmi Narain — Defendant — Respondent.*

Second Appeal No. 1009 of 1944, Decided on 13-11-1945, from order of Temporary Civil and Sessions Judge, Cawnpore, D/- 20-4-1943.

Limitation Act (1908), Art. 39—Lease of shop—Lessor serving notice upon lessee to vacate shop by certain date—Lessee failing to do so and remaining in possession after date fixed by notice—Suit by lessor for compensation for use and occupation—Neither Art. 39 nor Art. 115 applies—Suit is governed by Art. 120—Limitation Act (1908), Arts. 115 and 120.

Trespass to land consists in an unjustifiable intrusion by one person upon land in the possession of another. Trespass is thus a wrong committed against the possession of the plaintiff. There is a wide distinction between continuing in possession of property of which the possession has commenced lawfully and intruding upon property which was not previously in the possession of the intruder. [Para. 4]

Plaintiff rented a shop to defendant in 1929. The plaintiff on 8-2-1933 served a notice on the defendant asking him to vacate the shop up to 25-2-1933 and informing him that if he did not vacate the shop, he would be liable for damages for use and occupation after that date. The defendant failed to give possession to the plaintiff until 15-9-1934 and hence the plaintiff brought a suit on 15-4-1937 for compensation for use and occupation:

*Held* (1) that the defendant was not a trespasser. The plaintiff was not in possession of the property but the defendant had lawfully entered into possession of that property and his remaining upon it after the determination of the lease and the notice to quit did not constitute a trespass upon the property in the required sense.

3. (42) A. I. R. 1942 All. 396 (398); I. L. R. (1943) All. 55; 203 I. C. 331; 1942 A. L. J. 571 (F B).



The suit was not therefore, a suit for compensation for trespass upon immovable property and hence Art. 39 did not apply. [Para 4]

(2) That Art. 115 was also not applicable. What the defendant had done was to commit a breach of his statutory liability under the provisions of S. 108 (g) of Transfer of Property Act. As the breach was of a statutory liability, Art. 115 did not apply. The suit was governed by Art. 120:34 Mad. 502, *Expl.* [Paras 5 & 6]

**Limitation Act —**

(42) Chitaley, Art. 39, N. 4; Art. 115, N. 1, Pts. 6 and 7.

*Shambhu Prasad, Walter Datt, P. N. Haksar and P. N. Shukla* — for Appellant.

*P. N. Sharma* — for Respondent.

**Judgment.** — This second appeal raises a question of limitation only. The plaintiff appellant Mt. Sukhdei had instituted her suit to recover sum of Rs. 1920 as compensation for use and occupation of a shop which had been rented to the defendant as far back as the year 1929. After some difficulties between the parties and some litigation, the plaintiff on 8-2-1933 served a notice on the defendant asking him to vacate the shop up to 25-2-1933 and informing him that if he did not vacate the shop, he would be liable for damages for use and occupation after that date at the rate of Rs. 5 per day. The defendant, it was said, failed to give possession to the plaintiff until 15-9-1934, hence the present suit which was filed on 15-4-1937.

[2] One of the points raised incidentally in the trial Court on issue 3, "to what damages, if any, is the plaintiff entitled?" was the question which Article of the Limitation Act was applicable to the suit. After considering the alternative possibilities of applying Art. 115 and Art. 120, Limitation Act, the learned City Munsif of Cawnpore held that Art. 120 was applicable and therefore decreed the suit for the whole amount claimed. As Art. 120 prescribed a period of 6 years and the whole of the period for which compensation was claimed fell within the period of 6 years prior to the institution of the suit, that was the only possible conclusion.

[3] In appeal the learned Temporary Civil and Sessions Judge of Cawnpore rejected the contention that Art. 115 or Art. 120 could be applied and he held that the suit was governed by Art. 39, Sch. 1, Limitation Act which prescribes a period of limitation of 3 years for a suit for compensation for trespass upon immovable property, and the time from which the period runs being the date of the trespass. He took the view that the defendant by holding over after receiving a notice to quit thereby became a trespasser and hence Art. 39 was applicable to a suit for compensation in respect of that trespass. In consequence of this decision he held that the suit was only in time with respect to the period of 5 months and 2 days

from 13-4-1934 to 15-9-1934 and he reduced the plaintiff's claim for damages from Rs. 1920 to Rs. 506 and decreed the claim with proportionate costs only and interest pendente lite and future at 6 per cent.

[4] On behalf of the plaintiff appellant, it is now contended that whatever Article may be applicable to such a suit as the present one, Art. 39 is certainly not applicable. The question in effect resolves itself into a different question, that is, what was the real position of the defendant holding possession of this property, into possession of which he had come in a perfectly legal manner, after the period fixed in the notice. In the ordinary way, suppose a tenant continues to hold over after the expiry of his lease and the landlord accepts rent from him, the tenant who was previously a lessee under the contract between the parties becomes what is called a tenant by sufferance; but, at any rate, he is *prima facie* still a tenant. The position after the tenancy has been determined by a notice will obviously be somewhat different. But for the purposes of considering the applicability of Art. 39 the question which has to be decided is whether thereafter he is in possession as a trespasser. In my judgment it cannot be said that he is a trespasser. The general impression I derive from Art. 39, from the notes to Art. 39 in Chitaley's commentary on the Indian Limitation Act, Vol. II and the quotations from Salmond on Torts which he reproduces is that as stated in Clerk & Lindsell on Torts, Edn. 9, Chap. XV at p. 401,

"Trespass to land (I am quoting here from Clerk and Lindsell) consists in an unjustifiable intrusion by one person upon land in the possession of another."

It is obvious that there is a wide distinction between continuing in possession of property of which the possession has commenced lawfully and intruding upon property which was not previously in the possession of the intruder. In the passage quoted from Salmond on Torts trespass to immovable property is defined as follows:

"The wrong of trespass to land consists in the act of entering upon land in the possession of the plaintiff or remaining upon such land or placing any material object upon it, in each case without lawful justification."

Another passage quoted in Chitaley runs as follows:

"Trespass is, thus, a wrong committed against the possession of the plaintiff."

In the same section of his notes Chitaley quotes from a Madras decision in the following terms:

"But where there is no proof of the plaintiff's possession being disturbed, a suit for compensation cannot be sustained."

It appears to me that the upshot of all these clearly is that the present suit is not a suit for



compensation for trespass upon immovable property. The plaintiff was not in possession of the property but the defendant had lawfully entered into possession of that property and his remaining upon it after the determination of the lease and the notice to quit does not constitute a trespass upon the property in the required sense. The only case upon which learned counsel for the respondent has been able to found his argument for the applicability of Art. 39 is a Bench decision of the Madras High Court in [Ramasami Reddi v. Authi Lakshmi Ammal], 34 Mad. 502.<sup>1</sup> That, however, was rather a peculiar suit. The plaintiff instituted two suits. He instituted a suit for ejectment of the defendant from certain property, the facts of which are not reproduced in the decision. He also instituted a suit for mesne profits for the period between the institution of the ejectment suit and the date of judgment in that suit. It was found that there were no profits actually collected and it was held that this was a suit for compensation for trespass upon immovable property. The learned Judges then said:

"We have then to decide between Art. 39 and the residuary Art. 120. Is the present action one for compensation for trespass upon immovable property? We have come to the conclusion, though not without hesitation, that it is. The action under the English Law in such a case as the present was in trespass. A claim for mesne profits when the plaintiff has been ousted from possession is essentially one for damages".

The difficulty in estimating the value of this decision arises from the absence of any information as to the nature of the suit for ejectment. If that was a suit for ejectment of the defendant as a trespasser, then one would naturally expect the suit for compensation for the period during which that suit was pending to be a suit to which Art. 39 would apply in preference to Art. 120. The decision therefore does not really help in the decision of the present case. In my judgment Art. 39 is not applicable.

[5] The alternative put forward on behalf of the respondent is that Art. 115, Sch. 1, Limitation Act is applicable. That Article provides a period of 3 years' limitation for a suit for compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for, and the time from which the period begins to run is "when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases." There are in a sense two answers to this contention. In the first place, I do not think that the present suit is one to which Art. 115 applies at all. What the defendant has done is to commit a breach of his statutory

liability under the provisions of S. 108 (q), T. P. Act. By that provision:

"In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property."

Bearing in mind the words with which the section opens, I think it is impossible to say that the liability imposed on the lessee by cl. (q) of this section is a liability imposed by a contract either express or implied. On the contrary, it is a statutory liability and Art. 115 does not provide a period of limitation for a suit for compensation for breach of a statutory liability or, as it might be described, breach of statutory duty. The second answer to this contention put forward by Mr. Dutt on behalf of the appellant is that if this article were to be construed as to be applicable it would not justify a reduction of the plaintiff's claim. The plaintiff is claiming compensation or damages for breach of the liability and although she has chosen to put the claim in the form of an arithmetical calculation based on the period for which she was kept out of possession, she was perfectly entitled to claim this sum or indeed any larger or smaller sum which she might fix as a suitable amount of compensation for breach of the statutory duty which lay upon the defendant.

[6] Upon a consideration of the arguments put before me and the terms of the articles, it seems to me to be clear that neither Art. 39 nor Art. 115 was applicable to the present suit. No other article has been suggested as being applicable in the course of argument. In my opinion the learned Munsif was perfectly right in holding that the case fell within the scope of Art. 120 and he was, therefore, right in decreeing the plaintiff's claim as made by her. I accordingly allow this appeal with costs, set aside the decree of the lower appellate Court and restore the decree of the trial Court. Leave for Letters Patent appeal is refused.

D.S./D.H.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 33 [C. N. 18.]**

MALIK AND WALI ULLAH JJ.

*Madho Singh and another — Appellants v. Jang Bahadur and others—Respondents.*

First Appeal No. 104 of 1946, Decided on 26th April 1946, from order of Special Judge, 1st Grade, Etah, D/- 31st January 1946.

U. P. Encumbered Estates Act (25 [XXV] of 1934), S. 9—Application by landlords under Act—One of creditors impleaded as opposite party dying but landlord applicants not bringing his legal re-

1. (11) 34 Mad. 502 (504):8 I. C. 162.



representatives on record in time — Application against deceased creditor abating — His legal representatives can apply under S. 9 and need not apply for setting aside abatement.

Where landlords have made an application under the U. P. Encumbered Estates Act and after the death of one of the creditors impleaded as opposite party, have not brought his legal representatives on record within 90 days, the landlords' application petition abates *qua* the deceased creditor but his debt is not extinguished. It is open to the legal representatives of the deceased creditor in such a case to apply under S. 9 setting forward their claim and need not apply for setting aside the abatement. [Para 1]

*P. M. Verma and Jagdish Sahai*—for Appellants.

**Malik J.** — There is no force in this appeal. The appellants were the landlord applicants under the Encumbered Estates Act. One of the creditors who was impleaded as an opposite party was Jyoti Prasad. He died, but the landlord applicants did not apply for bringing his legal representatives on the record within 90 days. The result of that failure was held by this Court to be that the debtors' application petition had abated *qua* Jyoti Prasad. The High Court had overruled the suggestion made on behalf of the landlord applicants that Jyoti Prasad's debt had been extinguished. The result, therefore, of that decision is that the landlord applicants' application as against Jyoti Prasad was deemed to have abated while Jyoti Prasad's debt was held to be still outstanding. The application filed on behalf of the landlord applicants as against others was still pending and was not dismissed in its entirety. It is open to any creditor, whether he is impleaded by the landlord applicant or not, to file a claim under S. 9 so long as the claim is within time. Jyoti Prasad's sons and grandson filed an application under S. 9 that they might be allowed to prove their claim against the landlord applicants. It is clear that the application was filed within time and that fact is not disputed by learned counsel for the appellants. What he has, however, urged is that the only remedy open to the respondents was to apply for the setting aside of the abatement. It has now been held that the abatement was not due to any default on their part. It was held by a Bench of this Court in [*Gokaran Singh v. Brij Bhukan*] 1939 A. L. J. 928<sup>1</sup> that the landlord applicants must be treated as plaintiffs and that the creditor is in the position of a defendant. It was relying on this ruling that this Court has held *inter partes* that the application of the landlord applicants as against Jyoti Prasad had abated but that Jyoti Prasad's claim was not extinguished. There can be, therefore, no question of the respondents applying for the setting aside of the abate-

ment. The result of the decision of this Court *inter partes* is that there is an application on behalf of the landlord applicants under S. 8, Encumbered Estates Act but Jyoti Prasad or his estate is no longer included in the list of creditors given by the landlord applicants. It was open to Jyoti Prasad's legal representatives to file an application under S. 9 setting forward their claim. It being admitted that limitation had not expired, there is no reason why the respondents should be forced to apply for setting aside the abatement and should not be allowed to put in an independent claim in their own right. There is no force in this appeal and we dismiss it under O. 41, R. 11, Civil P. C.

D.S./D.H.

*Appeal dismissed.*

### A. I. R. (34) 1947 Allahabad 34 [C. N. 19]

VERMA AND BIND BASNI PRASAD JJ.

*Mirza Mohammad Anwarul Ahsan — Plaintiff—Appellant v. Mt. Naznin Begam and another — Defendants — Respondents.*

First Appeal No. 235 of 1944, Decided on 16-4-1946, from order of Addl. Civil Judge, Benares, D/-12-5-1944.

(a) Court-fees Act (1870), S. 6 (3), Proviso (U. P. Amendment) — Order of dismissal under S. 6 (3) Proviso cannot be treated as order of dismissal under O. 9, R. 8, Civil P. C. — Application under O. 9, R. 9, Civil P. C., does not lie against such dismissal—Civil P. C. (1908), O. 9, R. 9.

The order of dismissal mentioned in O. 9, R. 8, Civil P. C., is an order which is passed on account of the failure of the plaintiff to appear when the suit is called on for hearing, while the dismissal mentioned in the proviso to S. 6 (3), Court-fees Act, is brought about by the failure of the plaintiff to make good a deficiency in court-fee for the payment of which the Court has permitted him to furnish security. The two dismissals cannot be treated as identical. When the Court passes an order of dismissal under the proviso, to S. 6 (3), Court-fees Act the order should not be taken to be an order of dismissal under O. 9, R. 8, Civil P. C.

[Paras 3 and 4]

The fact that the plaintiff is absent on the day the order is passed cannot make the order one under O. 9, R. 8. Hence an application under O. 9, R. 9 does not lie against such dismissal. [Para 5]

(b) Interpretation of Statutes — Plain language should be given its plain meaning — Court should not speculate as to intention of Legislature.

The function of the Courts is to look at the plain language of the statute and to give it its plain meaning and not to speculate as to what might have been the intention of the Legislature. [Para 3]

*J. Swarup* — for Appellant.

*Aziz Hasan and B. Upadhiya* — for Respondents.

**Verma J.**—The material facts are these. The suit out of which this appeal has arisen was filed by one Mt. Maryam Begam. A question as to deficiency in court-fee was raised by an Inspector of Stamps. Eventually, on 22-10-1943, a finding was recorded by the Court to the effect that there was a deficiency in court-fee to the extent of Rs. 785 and the plaintiff was ordered to make

1. ('39) 26 A. I. R. 1939 All. 717 (718) : I. L. R. (1939) All. 892 : 185 I. C. 402 : 1939 A. L. J. 928.



good this deficiency by 4-11-1943. On 3-11-1943 the plaintiff applied that she might be permitted to give security to the satisfaction of the Court for payment of the deficiency in court-fee within such time as the Court might allow. This application was allowed on 10-11-1943 and the plaintiff was ordered to furnish security to the satisfaction of the Court by 18-11-1943 undertaking that the deficiency specified in the order passed on 22-10-1943 would be paid by the first date of final hearing which would be fixed on the date on which issues would be framed. The security was duly furnished. On 23-11-1943 issues were framed and 13th and 14th March 1944 were fixed for final hearing. Subsequently it transpired that the plaintiff, Mt. Maryam Begam, had in the meantime died and the present appellant, who is her son, applied to be brought on the record as plaintiff in his mother's place. This application was granted on 31-1-1944. Amendments in the pleadings of the parties followed and an additional issue was framed on 25-2-1944. On the same date, i. e., on 25-2-1944, the Court ordered that the new plaintiff must pay the court-fee, which had been found by the order of 22-10-1943 to be due, by the date fixed for final hearing. The suit came up for hearing on 13-3-1944 which, as already stated was the date fixed for the final hearing of the suit. It then transpired that the deficiency in court-fee had not been made good. The plaintiff's counsel stated that his client was absent and that he had no instructions. The Court thereupon recorded an order in which it made the following observations: "The deficiency of court-fee, as per the finding dated 22-10-1943 and the order dated 25-2-1944 has not been made good. Section 6 (3), proviso, therefore applies," and concluded its order in the following words: "Suit dismissed with full costs to the contesting defendants from the plaintiff." On 16-3-1944 an application was filed on behalf of the appellant. This application purported to be under O. 9, R. 9, Civil P. C., and the prayer was that the dismissal of the suit be set aside. The Court below has dismissed that application and this appeal is directed against that order.

[2] The contention raised on behalf of the appellant is that the order dismissing the suit passed on 13-3-1944 was, or at any rate must be treated as, an order passed under O. 9, R. 8, Civil P. C., and that, therefore, an appeal lies under O. 43, R. 1 of the Code. The argument on behalf of the respondents, on the other hand, is that that order was not under O. 9, R. 8, that consequently no application under O. 9, R. 9 was maintainable and that, therefore, no appeal lies from the order complained of.

[3] Learned counsel for the appellant relies on the fact that the word used in the main

paragraph of sub-s. (3), S. 6, Court-fees Act (as amended by the U. P. Provincial Legislature) is "reject" and the word used in the proviso to that sub-section is "dismiss", and argues that this shows that the intention of the Legislature was that, when the Court passes an order of dismissal under the proviso, the order should be taken to be an order of dismissal under O. 9, R. 8, Civil P. C. We are unable, however, to see any justification for this argument. In the first place, if that was the intention of the Legislature, it has certainly not indicated it, directly or indirectly, expressly or by implication. In the second place, the function of the Courts is to look at the plain language of the statute and to give it its plain meaning and not to speculate as to what might have been the intention of the Legislature. In the third place, the order of dismissal mentioned in O. 9, R. 8 of the Code is an order which is passed on account of the failure of the plaintiff to appear when the suit is called on for hearing, while the dismissal mentioned in the proviso to S. 6 (3), Court-fees Act is brought about by the failure of the plaintiff to make good a deficiency in court-fee for the payment of which the Court has permitted him to furnish security. We are unable, therefore, to accept the contention that the two dismissals must be treated as identical.

[4] It may also be pointed out that the reason—if it is necessary to search for a reason—for the difference in the words used in the main paragraph and the proviso to S. 6 (3), Court-fees Act may be this. The main paragraph deals with a case where the plaintiff, who has been ordered to make good a deficiency in court-fee, has not asked for any latitude, whereas the proviso deals with a case where the plaintiff has asked for and has been allowed a concession in that he has been permitted to furnish security and thus gain time for the payment of the deficiency, and so the Legislature thought fit to use the stronger word in the proviso. Be that as it may, we are unable to see any reason for holding that the order passed on 13-3-1944 was an order under O. 9, R. 8, Civil P. C. That being so, the appellant had no right to apply under O. 9, R. 9. The decision of the Court below was therefore, correct and this appeal is not maintainable.

[5] It is true that the plaintiff's counsel stated before the Court below that the plaintiff was absent but that cannot be relied upon in support of the argument that O. 9 of the Code was applicable. A plaintiff who is not prepared to make good the deficiency in court-fee, which he has been ordered to pay and for which he has been allowed to furnish security, cannot be allowed to nullify the proviso to S. 6 (3), Court-



fees Act by failing to appear. For the reasons given above we dismiss this appeal with costs.

[6] **Bind Basni Prasad J.**—I concur with the view expressed by Hon'ble K. Verma J., and I desire to add a few words. There is a sharp distinction between the dismissal of a suit under the proviso to sub-s. (3), S. 6, Court-fees Act and that under O. 9, R. 8, Civil P. C. They contemplate different stages of the proceedings. The proviso to sub-s. (3), S. 6 does not contemplate the appearance or the non-appearance of the plaintiff on the date of the hearing. All that it is concerned with is the non-payment of the court-fee. If the deficiency in the court-fee is paid the suit will proceed, no matter whether the plaintiff is present or not. There can be no dismissal of a suit under the proviso to S. 6 (3), Court-fees Act if the requisite court-fee has been paid. On the other hand, under O. 9, R. 8 a dismissal takes place only for non-appearance of the plaintiff irrespective of the fact that the court-fee has already been paid. This distinction should be prominently kept in view.

[7] Section 6, Court-fees Act, as it stands at present, was enacted by the Provincial Legislature recently and along with it ss. 6A, 6B and 6C were added. A perusal of these sections will show, they deal with a new subject which was not to be found in the old Court-fees Act. That new subject was the report of the Inspecting officers of the Stamp Department. Formerly such reports when they came before the Courts were accepted or rejected by the Courts and the authorities of the Stamp Department had no legal remedy open to them to question the findings of the Court on the reports. These sections now give a remedy to the authorities of the Stamp Department to question the findings of the Court on the reports and make the provisions stringent so that in the event of their reports being accepted the deficiency in court-fee might be made good. It is for this reason that in sub-s. (3), S. 6, Court-fees Act two provisions have been made. In the main sub-section there is the provision for the rejection of the plaint and in the proviso to that section there is a provision for an order of the dismissal of the suit. It will be seen that these provisions for the rejection of the plaint or the dismissal of the suit follow from the report of an officer mentioned in S. 24A, Court-fees Act and not from the report of the office of the Court. For the latter class of cases provision for rejection of the plaint is made in O. 7, R. 11, Civil P. C.

D.S./D.H.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 36 [C. N. 20]**

VERMA AND BIND BASNI PRASAD JJ.

*Banshi and others—Defendants-Appellants v. B. Sobhnath Singh, Plaintiff and another, Defendant—Respondents.*

First Appeal No. 98 of 1945, Decided on 16-4-1946, from order of Civil Judge, Benares, D/-27-1-1945.

(a) U. P. Temporary Postponement of Execution of Decrees Act, (10 of 1937) (now repealed)—S. 2 (2), (g)—Schedule does not deal with castes but classes—Tanner or leather worker—Person chamar by caste—No presumption that he is tanner or leather worker.

The schedule does not deal with castes. It deals with classes, in other words with callings or occupations. The mere fact that a person is chamar by caste can be no justification for holding that he must necessarily be a tanner or leather worker; that fact must be proved by credible evidence. [Para 2]

(b) U. P. Temporary Postponement of Execution of Decrees Act, (10 of 1937), (now repealed)—S. 2 (2)—Schedule—Conditions as to both residence and class must be satisfied.

Residence outside the limits of a municipality is not by itself sufficient to bring a person within the schedule. In addition to that he must also belong to one of the classes mentioned in the schedule. [Para 3]

*Ambika Prasad*—for Appellants.

*B. Upadhya*—for Respondents.

**Verma J.**—This is a defendants' appeal arising out of a suit for sale on foot of a deed of simple mortgage. The Munsif dismissed the suit on the ground that it was barred by time and did not try the remaining issues. On the plaintiff's appeal, the lower appellate Court differed from the Munsif on the question of limitation and remanded the case to the Court of the Munsif for the trial of the remaining issues. This appeal is directed against that order of remand. The facts relevant to the question that arises for consideration are these. The deed in suit was executed on 22-1-1929, by Tunni, the father of the present defendants, and by Banshi, defendant 1. Tunni died sometime later and the other three defendants were impleaded in the suit as his legal representatives. A period of 2 years was fixed in the deed for payment. Thus, the period prescribed in Art. 132, Limitation Act, had to be computed from 22-1-1931. The suit, therefore, would have been within time if it had been brought by 22-1-1943. It was, however, actually instituted on 20-5-1943. The plaintiff averred in the plaint that the suit was saved from limitation because the defendants were "agriculturists" within the meaning of that expression as given in S. 2 (2), Temporary Postponement of Execution of Decrees Act, (U. P. Act 10 [X] of 1937). What he apparently meant was that the defendants being such agriculturists, he was entitled under S. 5 of the Act, to exclude the period during which the Act remained in force. The ground on which the defendants were alleged to be "agri-



culturists" was not mentioned in the plaint. At the trial, however, the plaintiff alleged that the defendants belonged to one of the classes of persons mentioned in the Schedule attached to Act 10 [X] of 1937, namely, "tanners and leather workers". The defendants denied this allegation and alleged that none of them was a tanner or a leather worker. It was admitted by the defendants that they were ordinarily living outside the limits of a municipality, but they alleged that the additional qualification required by the Act, namely, that of belonging to one of the classes of persons mentioned in the Schedule, was non-existent in their case.

[2] The Munsif held that there was no credible evidence to show that the defendants, or any one of them, belonged to the class alleged by the plaintiff and that there was reliable evidence which showed that two of the defendants were in the service of two thekedars in the city of Benares, another one was working as a weaver in the employment of a cloth manufacturer in Mohalla Alipur in the city of Benares and the fourth one was working in a mill situated at Sheopur in the district of Benares. The learned Judge below, however, allowed the plaintiff's appeal on the ground that as the defendants were chamars by caste, they must be taken to belong to the class of tanners and leather workers. Having heard learned counsel for the parties, we have come to the conclusion that the lower appellate Court's decision cannot be sustained. The learned Judge began his judgment with the following sentence: "The defendants are Chamars by caste and the caste, as a whole, has been included in the Schedule for purposes of S. 2, sub-cl. 2 (g) of Act 10 [X] of 1937." It is sufficient to say that the learned Judge was obviously wrong. The Schedule does not deal with castes. It deals with classes, in other words, with callings or occupations. The mere fact that a person is a Chamar by caste can be no justification for holding that he must necessarily be a tanner or a leather worker. It is obvious, in our opinion, that the learned Judge allowed his mind to be influenced by a presumption for which there is no justification. A man, who is a Chamar by caste, may or may not be a tanner or a leather worker. It was, therefore, the duty of the plaintiff to adduce credible evidence to establish his allegation that the defendants were tanners and leather workers. At the request of the plaintiff-respondent's counsel, we have gone through the evidence for ourselves, and we do not find it possible to say there was any reliable evidence adduced by the plaintiff which could justify the Court in holding that he had proved his allegation. The plaintiff's evidence consisted only of his own deposition and, having read it, we are not sur-

prised that the learned Munsif did not find it possible to believe his allegation. The learned judge below does not deal with the evidence at all.

[3] The judgment of the Court below shows that the learned Judge was also of the opinion that residence outside the limits of a municipality was by itself sufficient to bring a person within the Schedule. That is clearly incorrect. In addition to that a person must also belong to one of the classes mentioned in the Schedule. Our conclusion, therefore, is that the decision at which the Munsif had arrived was correct. The appeal is accordingly allowed, the order passed by the lower appellate Court is set aside and the decree of the trial Court, dismissing the suit, is restored. The appellants shall have their costs throughout.

G.B./D.H.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 37 [C. N. 21]  
FULL BENCH**

ALLSOP AG. C. J., MATHUR AND SANKER  
SARAN. JJ.

*Siri Kishan Das and another—Applicants  
v. Mohd. Nazir and another—Opposite party.*

Misc. Case No. 250 of 1942, Decided on 1-4-1946.  
Reference made by Civil Judge, Meerut through District Judge, Meerut as per his letter No. 34, D/- 9-7-1942.

Stamp Act (1899), Art. 4, Exemption (b) — Word "immediate" in, refers to purpose and not to time—  
Affidavit sworn in Bombay on 24th April 1942 for filing at Meerut filed at Meerut on 12th May 1942—  
Affidavit comes within exemption.

The word "immediate" in Art. 4, Exemption (b) refers to purpose and not to time. Where an affidavit was sworn in Bombay on 24th April 1942 for the set purpose of being filed in a Court at Meerut in connection with a pending proceeding it cannot be said that it was not sworn for immediate use in a Court of law merely because it was not filed at Meerut till 12th May 1942. It is therefore unnecessary to stamp the affidavit. 12 Bom. 276, *Expl.* [Para 1]

(45 Com.) Stamp Act, Art. 4, N. 2, Exemption (b), Pt. 1.  
*Mansur Alam* — for Applicants.

**Allsop Ag. C. J.** — An affidavit was sworn in Bombay on 24th April 1942, for the set purpose of being filed in a Court in Meerut in connection with a pending proceeding. As it was not filed till 12th May 1942, the suggestion is that it was not sworn for immediate use in a Court of law. We have been referred to the case [In re: the application of Seshamma] 12 Bom. 276,<sup>1</sup> but in our judgment, that case does not support the contention that this affidavit should have been stamped. In our judgment, the word "immediate" refers to purpose and not to time. We hold that it is unnecessary to stamp the affidavit. A copy of our judgment shall be sent to the Chief Revenue authority under the provisions of S. 59 (2), Stamp Act, 1899.

G.N.

*Order accordingly.*

1. (38) 12 Bom. 276 (277).



A. I. R. (34) 1947 Allahabad 38 [C. N. 22]

WALI ULLAH J.

*Bhagwati Prasad — Plaintiff—Applicant*  
*v. Chatrapal and others — Defendants —*  
*Opposite party.*

Civil Revn. No. 186 of 1945, Decided on 3-4-1946,  
 from order of Judge, Small Cause Court, Cawnpore,  
 D/-18-11-1944.

(a) Limitation Act (1908), Arts. 75 and 80 —  
 Instalment bond—On default of any one instalment,  
 option to creditor to realise whole amount with  
 interests or to sue for defaulted instalment only —  
 Further option to creditor to realise whole amount  
 when last instalment became due — Default com-  
 mitted in payment of first instalment—Suit brought  
 after 3 years from such default is barred under  
 Art. 75 — Art. 80 has no application — Option to  
 sue when last instalment fell due could not arrest  
 running of time under Art. 75 — Contract Act  
 (1872), S. 23.

An instalment bond provided that in case of default  
 in payment of any instalment the creditor was to have  
 the right to realise the entire amount under the bond  
 with interest at certain rate or only the amount in  
 respect of instalment in payment of which default was  
 committed. It was further stipulated that the creditor  
 was to have the right to realise by filing a suit in Court  
 the total amount due from the executant on account of  
 the principal and interest after the expiry of time for  
 all the instalments i. e., at the time when the last  
 instalment fell due. No instalment was ever paid at  
 any time by the executant, so the first default in pay-  
 ment occurred in June 1934. The creditor instituted  
 the suit on 22-7-1944 :

*Held* (1) that as the entire amount under the bond was  
 realisable on default in payment of an instalment, the  
 whole amount became due when the first default was  
 committed and therefore time began to run under Art. 75  
 from the date of the first default i. e. June 1934, no  
 matter whether the creditor had been given the option  
 of suing only for the instalment in respect of which a  
 default had been committed. The third option given to the  
 creditor to sue for the entire amount at the time when  
 the last instalment became due could not arrest the  
 running of time when once it had begun to run under  
 Art. 75. Such a stipulation was nothing short of a con-  
 tract or agreement between the parties for altering the  
 statutory period of limitation, namely three years as  
 prescribed by Art. 75 and must therefore be deemed to  
 be void under S. 23, Contract Act. The suit was there-  
 fore barred by limitation under Art. 75. [Paras 4, 6 and 7]

(2) that Art. 80 being the residuary article had no  
 application : ('34) 21 A. I. R. 1934 All. 661 (F. B.);  
 1943 A. L. J. 238 and ('34) 21 A. I. R. 1934 All.  
 1039; *Ref.* ; ('33) 20 A. I. R. 1933 All. 235, *Disting.*

[Para 4]

Limitation Act. —

('42) Chitaley, Art. 75, N. 8, Pt. 3a.

(b) Limitation Act (1908), Art. 75—'Bond payable  
 by instalments' — Meaning of.

A bond is payable by instalments only when the  
 principal amount thereof is payable by instalments and  
 not where the interest is payable on particular dates but  
 the whole of the principal is payable after a fixed date.

[Para 7]

Limitation Act. —

('42) Chitaley, Art. 75, N. 4, Pt. 1.

*Ambika Prasad — for Applicant.**G. Agarwala and K. N. Agarwala*

— for Opposite party.

**Judgment.**—This is an application in revision  
 by the plaintiff under S. 25, Small Cause Courts  
 Act, against the decree passed by the learned  
 Judge of the Small Cause Court dismissing his  
 suit as barred by limitation.

[2] It appears that one Durga Ahir executed  
 a promissory note on 25-12-1930 for Rs. 200 in  
 favour of Radhe Shiam. It was stipulated that  
 interest would be paid on the amount borrowed  
 at the rate of Rs. 2 per cent. per mensem. Sub-  
 sequently on 24-9-1933, Durga Ahir executed a  
 simple money bond for Rs. 200 in favour of  
 Radhe Shiam. It was recited in the bond that  
 the amount due under the earlier promissory  
 note dated 25-12-1930, together with interest came  
 to a large amount but owing to the poverty of  
 the executant of the bond (Durga Ahir) Radhe  
 Shiam, the creditor, had given up his claims to  
 interest and had agreed to accept the bond for  
 Rs. 200 only in lieu of the earlier promissory  
 note. It was stipulated in the bond that the sum  
 of Rs. 200 would be paid by instalments of Rs. 20  
 each every year in the month of *Jaith*. It was  
 further provided in the bond that in case of  
 default in the payment of any instalment the  
 lender aforesaid shall have the right to realise  
 by filing a suit either the entire amount of the  
 instalments in respect of which default be com-  
 mitted and those in respect of which there be no  
 default till then with interest at 1 per cent. per  
 mensem or only the amount in respect of in-  
 stalment in payment of which default be com-  
 mitted. Further it was stipulated that the said  
 Lala Saheb (the lender) will also have the right  
 to realise by filing a suit in Court the total  
 amount due from the executant on account of  
 principal and interest after the expiry of time for  
 all the instalments, that is at the time when the  
 last instalment fell due. The plaintiff is the son  
 of Radhe Shiam who is dead. The defendants  
 are the sons of Durga who is also dead. The  
 suit was instituted on 22-7-1944.

[3] It is common ground that no instalment  
 was ever paid at any time by the executant, so  
 the first default in payment occurred in June  
 1934. The suit was contested substantially on the  
 grounds that Durga had not executed the bond  
 in suit; that it was not for consideration and  
 that in any event the suit was barred by limita-  
 tion. On a consideration of the evidence on the  
 record the learned Judge of the Court below  
 found that the bond in suit was duly executed  
 by Durga deceased and was for consideration.  
 He also recorded a finding that the suit was  
 governed by Art. 75, Lim. Act, and was conse-  
 quently barred by time. The suit was accordingly  
 dismissed but there was no order for costs.

[4] Learned counsel for the plaintiff-ap-  
 plicant has strongly contended that the Court



below took an erroneous view of the law in applying Art. 75, Limitation Act, to the facts of the present case. His contention is that the proper article to apply was Art. 80, Limitation Act, and the suit was consequently within time. It is, however, obvious that Art. 80 would have no application if the suit falls within the purview of Art. 75, of the Act. The crucial question, therefore, is whether on a proper interpretation of the bond in suit the case comes within the four corners of Art. 75. The material portions of the bond in suit have been set out above. It was provided in the bond that payments were to be made by instalments. It was further provided that if default was committed in the payment of any one instalment the creditor could realise the entire amount due under the bond with interest at one per cent per mensem. In view of these stipulations in the bond, it must be held that according to the provisions of the bond the whole amount became due at the time when the first default was committed. Learned counsel for the applicant, however, contends that it is clear from the provisions of the bond itself that a third option was given to the creditor namely a right to sue for the entire amount due under the bond together with interest at the time fixed for the payment of the last instalment. His contention is that owing to what he characterises as the option 3 given to the creditor time did not begin to run against the plaintiff applicant from the date of the first default. He argues that according to the special stipulation—the so-called option 3—in the bond the plaintiff could institute the suit within three years of the time fixed for payment of the last instalment. If this contention is correct Art. 75 has no application and the case would be governed by Art. 80. This contention was raised on behalf of the plaintiff applicant in the Court below as well but it was repelled by the learned Judge. The learned Judge of the Court below has relied upon the case in [Munshi Lal v. Sagar Mal] (1943) A. L. J. 238,<sup>1</sup> which in its turn is based on a Full Bench ruling of this Court in [Jawahar Lal v. Mathura Prasad] (1934) A. L. J. 1035.<sup>2</sup> The learned Judge of the Court below has found as a fact that there was no allegation or evidence to show that the creditor ever waived the benefit of the default clause in the bond. In regard to the stipulations contained in the bond, the learned Judge was of opinion that on a proper interpretation of the document as a whole there was no third and distinct option given to the creditor as contended for by the plaintiff. Learned counsel for the plaintiff applicant has

also contended that the principle laid down by a Bench of two learned Judges of this Court in [Lalta Prasad v. Gajadhar Shukul] (1933) A. L. J. 550<sup>3</sup> at p. 560 really governs the present case.

[5] Learned counsel for the defendant opposite parties has strongly relied on the Full Bench decision in (1934) A. L. J. 1035<sup>2</sup> and the case in (1943) A. L. J. 238<sup>1</sup> referred to above. During the course of arguments reference has also been made to the case in [Sukh Lal v. Bhoora] (1934) A. L. J. 1056.<sup>4</sup> I have considered these rulings with care and I have also carefully perused the stipulations contained in the bond in suit. It seems to me that the principles laid down by the Full Bench in (1934) A. L. J. 1035<sup>2</sup> may be summed up as under: In the case of an instalment bond, if it is provided that in the event of a default in payment of one instalment the creditor can bring his suit for realising the entire amount of the bond, the whole amount must be considered to *become due* within the meaning of col. 1, Art. 75, Limitation Act, and Art. 75 would be applicable to a suit based on such a bond. As Art. 75 would cover such a case neither Art. 74 nor Art. 80 can have any application. By virtue of the provisions of col. 3, Art. 75 time will begin to run from the date of the first default which makes the whole money due and if waiver is proved the date of a fresh default. In delivering the judgment of the Full Bench in the case mentioned above at p. 1043 Sir Shah Sulaiman C. J., is reported to have observed:

"If a case is directly covered by the language of col. 1, Art. 75, namely, it is a case of a suit brought on a bond payable by instalments which bond provides that if default be made the whole shall be due and the suit is brought after the whole has become due, then in my opinion, there is no escape from Art. 75."

[6] It follows, therefore, that time will begin to run from the date of default no matter whether the creditor has been given the option of suing only for the instalment in respect of which a default has been committed. The essential thing, to my mind, therefore is to find, on a proper interpretation of the language of the bond whether the entire amount of the bond becomes due on the occurrence of the default in question. If it be found that the entire amount becomes due the claim for the recovery of the amount would consequently become barred by time after three years or six years if the deed be a registered one. It may be that it is barred by time even before the date for payment of the last instalment arrives. The stipulation in the bond in suit in the present case to

1. ('43) 1943 A. L. J. 238 (239).

2. ('34) 21 A. I. R. 1934 All. 661 (675) : 57 All. 108 : 1934 A. L. J. 1035 : 151 I. C. 585 (F. B.).

3. ('33) 20 A. I. R. 1933 All. 235 (241) : 55 All. 283 : 1933 A. L. J. 550 : 149 I. C. 181.

4. ('34) 21 A. I. R. 1934 All. 1039 (1041) : 57 All. 561 : 153 I. C. 205 : 1934 A. L. J. 1056.



the effect that Lala Saheb will also have the right to realise by filing a suit in Court the total amount due from the executant on account of principal and interest after the expiry of time for all the instalments, that is, at the time when the last instalment falls due cannot arrest the running of time when once it has begun to run on account of the fact that Art. 75 governs the case. Such a stipulation is nothing short of a contract or agreement between the parties for altering the statutory period of limitation, namely three years as prescribed by Art. 75. It is, however, quite clear that parties cannot by contract alter the statutory period of limitation nor can they alter the statutory 'starting point' of limitation. Such a covenant must be deemed to be void under S. 23, Contract Act.

[7] Learned counsel for the plaintiff-applicant relied upon the observations of the learned Judges in 1933 A. L. J. 550<sup>3</sup> at p. 560 where it is observed that the covenant in the bond entitling the creditor to sue before the expiry of the stipulated period . . . . was for the benefit of the creditor, and it was open to him to waive that option and to wait for the full period of four years before putting the bond into suit. These observations no doubt are in favour of the applicant but this case is clearly distinguishable. It was not a case of a bond payable by instalments inasmuch as a bond is payable by instalments only when the *principal amount* thereof is payable by instalments and not where the interest is payable on particular dates but the whole of the principal is payable after a fixed date. Article 75 therefore, could not have applied in that case. In view of what has gone before, it seems to me that the suit was clearly barred by time and the Court below has taken a correct view of the law.

[8] In my opinion, therefore, there is no force in this application and it is accordingly dismissed. As observed by the learned Judge of the Court below the plaintiff-applicant may have been misled by the language in which the bond was couched. I, therefore, make no orders as to costs of this application.

K.S. *Revision petition dismissed.*

**A. I. R. (34) 1947 Allahabad 40 [C. N. 23]**

PATHAK J.

*Bhutan Ram — Applicant v. Madan Lal — Opposite Party.*

Civil Revn. No. 526 of 1944, Decided on 11-1-1946, from order of Judge, Sm. C. C., Deorai, D/-22-8-1944.

Civil P. C. (1908), O. 9, R. 13 and O. 17, R. 3 — Failure to file written statement on adjourned date — Decree passed *ex parte* against defendant — Decree is one under O. 17, R. 3 — Application under O. 9, R. 13 is not maintainable.

While O. 17, R. 2 mentions that it is open to the Court, on an adjourned hearing, to pass an order under

O. 9, O. 17, R. 3 merely says that the Court may proceed to decide the suit on the merits and does not, as an alternative, mention that it may pass an order under O. 9. The omission of reference to O. 9, in O. 17, R. 3 is significant and leads to an inference that if the conditions mentioned in O. 17, R. 3 are satisfied, the application of O. 9 is precluded and the only order which the Court can pass is one under O. 17, R. 3. [Para 2]

The filing of a written statement amounts to 'the performance of any act necessary to the further progress of the suit' within the meaning of O. 17, R. 3. Therefore, a decree passed *ex parte* against the defendant on failure to file written statement on the adjourned date is one under O. 17, R. 3, and an application to set it aside under O. 9, R. 13 is not maintainable. *Case law discussed.* [Paras 4 and 6]

C. P. C. —

('44) Chitaley, O. 9, R. 13, N. 6; O. 17, R. 3, N. 6, ('41) Mulla, O. 17, R. 3, P. 707, Notes. 'Remedy' and 'Procedure to be . . . rule'.

*Harnandan Prasad* — for Applicant.

*N. D. Pant* — for Opposite Party.

**Order.** — This is a revision under S. 25, Provincial Small Cause Courts Act. The facts may be stated as follows: The plaintiff, who is the opposite party in this revision, filed a suit in the Court of Judge Small Causes, Gorakhpur, for recovery of a sum of Rs. 70 on account of the price of cement supplied by him to the defendant, who is the applicant before me. 31st March 1944, was fixed for the final disposal of the suit. On that date, an application was made by the defendant for time to file his written statement. This application was granted and the case was adjourned to 2nd June 1944 on which date although the plaintiff was present, the defendant, who had not filed his written statement, was absent. The learned Judge examined one witness on behalf of the plaintiff and decreed the suit. The operative portion of the judgment runs as follows: "The suit to recover Rs. 70 is decreed with costs against the defendant *ex parte*." On 5th July 1944, the defendant filed an application purporting to be under O. 9, R. 13, Civil P. C. This application came on for hearing on 22nd August 1944, and the learned Small Cause Court Judge, without going into the merits of the application, dismissed the same upon the ground that it was not maintainable, as the suit had been decided under O. 17, R. 3, Civil P. C. From that order the defendant has preferred this revision.

[2] Learned counsel for the applicant contends that the suit was not decided under O. 17, R. 3, Civil P. C., and that it was decided *ex parte* under O. 9, R. 6 of that Code and, therefore, an application under O. 9, R. 13 was maintainable. On the other hand, counsel for the opposite party argues that time had been granted to the defendant to file written statement, which was necessary to the further progress of the suit, and therefore the date, on



which the suit was decided, was an adjourned hearing. The result, according to learned counsel, was that the terms of O. 17, R. 3 were satisfied and the only decree which the Court could pass on that date was one upon the merits under O. 17, R. 3. In order to appreciate the rival contentions of learned counsel appearing for the parties in this case, it is necessary to note that while O. 17, R. 2 mentions that it is open to the Court, on an adjourned hearing, to pass an order under O. 9; O. 17, R. 3 merely says that the Court may proceed to decide the suit on the merits and does not, as an alternative, mention that it may pass an order under O. 9. The omission of reference to O. 9, in O. 17, R. 3 is significant and leads to an inference that if the conditions mentioned in O. 17, R. 3 are satisfied, the application of O. 9 is precluded and the only order which the Court can pass is one under O. 17, R. 3.

[3] I now proceed to examine the rulings relied upon by learned counsel for the parties in this case. Strong reliance is placed by learned counsel for the defendant upon the ruling in [*Bhajan Singh v. Prem Narain*] 1936 A. L. J. 1274.<sup>1</sup> In that case, on the first date of hearing, the suit was adjourned at the instance of both the parties. It appears that the reason for adjournment was that there was a prospect of compromise. On the adjourned date, a list of witnesses signed by the defendant's counsel was filed in Court even before the case was called on for hearing, but at the time when it was called on, the plaintiff, his witnesses and his pleader were present. Thereupon the Court recorded the evidence produced on behalf of the plaintiff and decreed the suit, professedly, under O. 17, R. 3. On that very day, an application for setting aside the decree was made by the defendant and the learned Judge, without going into the merits of the application, rejected the same upon the sole ground that the decree having been passed under O. 17, R. 3, such an application did not lie. In these circumstances, Sulaiman, C. J. and Collister, J. came to the conclusion that, in the case before them, although the decree was one necessarily on the merits, the proceedings against the defendant being *ex parte*, the decree passed against him would also be *ex parte* within the meaning of O. 9, R. 13, Civil P. C. After holding that the mere filing of a list of witnesses did not amount to an appearance on behalf of the defendant, the Bench reached the conclusion that the decree passed against the defendant was without doubt *ex parte* and he was entitled as of right to show cause for his non-appearance under O. 9, R. 13.

1. ('36) 23 A. I. R. 1936 All. 619 (620) : 164 I. C. 541 : 1936 A. L. J. 1274.

The facts of that case are distinguishable from the facts in the present case. A request by the parties for adjournment of the case on the ground that there is a prospect of a compromise, is not one of the acts mentioned in O. 17, R. 3. In that case, it could not be said that time had been granted to the parties or to anyone of them to perform any of the acts necessary for the progress of the suit.

[4] Learned counsel for the applicant urges that a prayer for time to file a written statement would also not be covered by the terms of O. 17, R. 3 and the filing of a written statement does not amount "to the performance of any act necessary to the further progress of the suit" within the meaning of O. 17, R. 3. Having regard to the authorities which I shall quote hereafter, I am not prepared to accede to this contention. In my judgment, granting of time by the Court to file a written statement is covered by the provisions of O. 17, R. 3. On behalf of the plaintiff my attention has been invited to the ruling in [*Sheo Pujan Kalwar v. Bishnath Kalwar*] 1939 A. L. J. 627.<sup>2</sup> In that case, the defendant appeared on the date fixed for the final decision and applied for an adjournment in order to file a written statement. This prayer was allowed and, on the adjourned date, the defendant did not appear and the suit was decreed *ex parte* against him. Thereupon, an application for restoration was made and disposed of. The question, whether such an application was maintainable was mooted in this Court. Collister J. who decided that case read O. 17, R. 3 to mean that the only discretion, which was conferred upon the Court in a case where the conditions mentioned in O. 17, R. 3 were satisfied, was either to decide the case on that date or not, but if it did decide the suit, the decision was bound to be on the merits. Collister J. was of the view that the adjournment was granted for one of the particular objects contemplated by R. 3, and that although the decree was *ex parte* in the sense that it was passed in the absence of the defendant, appearance on behalf of the defendant had to be assumed whether he was, in fact, present or not. The absence of any mention of O. 9, in O. 17, R. 3 was also noticed and it was held that the application for restoration under O. 9, R. 13, did not lie. This ruling appears to be on all fours with the facts of the present case and I respectfully follow it. It is worthy of note that O. 17, R. 3 expressly lays down that the Court may proceed to decide the suit on the merits, whether the party in default is present or not.

[5] The next ruling to which reference has been made by learned counsel for the plaintiff

2. ('39) 26 A. I. R. 1939 All. 642 (643) : 186 I. C. 102 : 1939 A. L. J. 627.



is that in [Narain Das v. Madan-Mohan] (1939) A.L. J. 371.<sup>3</sup> In that case, the suit was adjourned on a joint application made by both the parties in order to enable them to have sufficient time to summon and produce witnesses. On the adjourned hearing, the plaintiff was absent and his counsel stated that he had no instructions to proceed with the case. Thereupon the Court recorded such evidence as was produced by the defendants and dismissed the suit under O. 17, R. 3. It was held that O. 17, R. 3 was applicable. Reference was made before the Bench, which decided this case in the High Court, to ruling in (1936) A. L. J. 1274<sup>1</sup> and referred to above, and the Bench distinguished it upon the ground that the real point that arose for decision in that case was whether the filing of a list of witnesses on behalf of the defendant before the case had been called on for hearing did or did not amount to an appearance on behalf of the defendant within the meaning of O. 17, R. 2. Learned counsel for the plaintiff also referred me to the case in [Raja Singh v. Manna Singh], A. I. R. 1940 ALL. 217.<sup>4</sup> In that case, on the date fixed for final hearing, the plaintiff appeared but neither the defendants nor their counsel appeared and after the recording of evidence produced by the plaintiff, the suit was decreed. On the facts of the case, it was held that it could not be said that the defendants had failed to take any step for which time had been allowed and, therefore, O. 17, R. 3 did not come into play. This ruling is not of any assistance in the decision of the point in controversy before me. The case in (1939) A. L. J. 627<sup>2</sup> mentioned by me above was referred to before the Bench which decided the case in A. I. R. 1940 ALL. 217<sup>4</sup> and the learned Judges did not dissent from the decision in (1939) A. L. J. 627<sup>2</sup> and distinguished the same from the case before them.

[6] On the whole matter, I have arrived at the conclusion that the decree passed by the learned Small Cause Court Judge on 2-6-1944 was one under O. 17, R. 3, Civil P. C. To such a decree, in my opinion, O. 9, R. 13 could not apply and the application for setting aside the decree under that rule was rightly dismissed by the learned Small Cause Court Judge. For the reasons indicated above, I dismiss this revision but in the circumstances of the case, I order the parties to bear their own costs in this Court.

G.M./D.H.

*Revision dismissed.*

3. (39) 26 A. I. R. 1939 All. 524 (526) : 183 I. C. 703: 1939 A. L. J. 371.  
4. (40) 27 A. I. R. 1940 All. 217 (218): 188 I. C. 411.

A. I. R. (34) 1947 Allahabad 42 [C. N. 24]

MULLAH AND YORKE JJ.

*B. Ram Chander Sahai — Plaintiff-Appellant v. Cantonment Board of Meerut — Defendant-Respondent.*

Second Appeal No. 804 of 1942, Decided on 1-11-1945, from order of Addl. Dist. Judge, Meerut, D/- 23-12-1941.

(a) Cantonments Act (1924), S. 273 (1) and (3) — Effect of sub-ss. (1) and (3), stated.

The effect of the provisions of sub-ss. (1) and (3) of S. 273 and similar provisions in other Acts has been held to be that a plaintiff is entitled to institute his suit within eight months of the date of the accruing of the cause of action after having delivered notice to the Board not less than two months prior to the institution of the suit. [Para 6]

(b) Cantonments Act (1924), S. 273 — Object.

Section 273, Cantonments Act makes provision for the protection of public authorities by cutting down the period of limitation within which suits of particular kinds must be instituted against the Board and by providing that no such suit shall be instituted without a notice delivered not less than two months prior to the institution of the suit. The object of these two provisions is to give these public authorities an opportunity to settle such claims without suit and to afford them protection against suits filed after considerable delay with the result that the burden falls upon a different set of tax-payers and not upon the body of tax-payers as it existed at the date of the cause of action. [Para 12]

(c) Cantonments Act (1924), S. 273 (1)—'Act done or purporting to have been done in pursuance of this Act'—Meaning—Post of Office Superintendent carrying certain fixed pay — Person appointed as Office Superintendent but paid less pay according to new scale introduced by Board but not sanctioned by Eastern Command — Suit by person for payment of arrears of pay — S. 273 (1) does not apply.

It is to acts which the Board has not merely the authority, but also the duty to perform, that is, acts which are enjoined upon the Board that the protection afforded by S. 273 extends. In other words, 'act done by the Board in pursuance of this Act' means an act enjoined upon the Board by the Act. [Paras 13, 32]

The post of an Office Superintendent carried a salary of Rs. 300 per month. The plaintiff was appointed and confirmed as Office Superintendent but was paid Rs. 225 according to the new scale introduced by the Board but not sanctioned by the Eastern Command. The plaintiff, on retirement, brought a suit for arrears of his salary on the basis that he was entitled to the payment of Rs. 300 every month.

Held that though the Board had power to appoint an Office Superintendent there was no statutory obligation on or duty of the Board to make the appointment. The breach of the implied contract to pay the plaintiff Rs. 300 per month was not therefore an act done in pursuance of the Act and hence the provisions of S. 273 (1) were not applicable to the suit. *Case law referred.* [Para 33]

C. B. Agarwala — for Appellant.

Dr. M. A. Rauf — for Respondent.

**Yorke J.** — This is a second appeal by one Ram Chander Sahai (who died during the hearing of the arguments and is now represented by other persons) who had on 19-9-1939 instituted a suit against the Cantonment Board of Meerut



for the recovery of Rs. 2500 as salary to which he claimed to be entitled but which had been withheld by the Board. The case has arisen in the following circumstances : The plaintiff is a man who had been for many years in the service of the Cantonment Board and in January 1933 was holding the post of Tax Superintendent of the Board on Rs. 150, p. m. In January 1933 one Mr. Palman, who had been in the service of the Board as permanent Office Superintendent on a salary of Rs. 300 per month, went on leave preparatory to retirement and the plaintiff was appointed as officiating Superintendent on Rs. 210, made up of Rs. 150 plus one-fifth of the salary of the post of Office Superintendent. In the year 1926 a new scale of pay of the office staff of the Cantonment Board had been sanctioned by the Board and the new scale of pay fixed for the Office Superintendent was Rs. 150 rising to Rs. 300. It is not clear from the record as to what the exact scheme of increments was but it would appear that it provided for three annual increments of Rs. 25 each to be followed by annual increments of Rs. 15 upto the maximum of Rs. 300. Be that as it may, it is free from doubt that this scale had never been submitted by the Board to the Eastern Command for sanction and in consequence at the date of the appointment of the plaintiff to the post of Office Superintendent the new scale of pay was not legally in force. The Board apparently had a peculiar habit of asking for sanction to the new rates of pay of each particular post at the time when a fresh appointment was being made to that post instead of seeking sanction to the scale as a whole.

[2] It was, in these circumstances, that on 24th July 1933, the plaintiff was made permanent on the post on a pay of Rs. 225 and that subsequently on 23rd February 1934 the Board confirmed the appointment of the plaintiff as Office Superintendent on Rs. 225. It was a contention on behalf of the Board that the plaintiff was himself responsible and somehow guilty of dishonesty in not bringing to the notice of the Board that the new scale had not been sanctioned, having an idea in his mind that he would later make a claim to be paid at the same rate as his predecessor, Mr. Palman. That contention was repelled by the learned Munsif, and although the learned additional District Judge thought that there was a deliberate omission to ask for sanction of the Eastern Command to the revised scale of pay applicable to plaintiff's case in August 1933, he took the view that the plaintiff could not be estopped from claiming that under the rules applicable to his case he was entitled to receive a salary of Rs. 300 from the date of his appointment.

[3] We are of opinion, after considering the circumstances of the case, that undoubtedly the appointment of the plaintiff on Rs. 225 in the new scale of pay was the result of a general misunderstanding. The Board and every one responsible failed to realise that the new scale had not been passed by the Eastern Command and hence the appointment was made as if the scale had been sanctioned. The Courts below have gone into the history of the appointment and have shown how the question as to what was the correct pay of the plaintiff-appellant, came to be raised and those Courts have held as a fact that the correct pay of the post was Rs. 300, and that the plaintiff could not be estopped from claiming pay at that rate by any conduct on his part. On 25th November 1936 as a result of the prior correspondence it was pointed out by the Accountant-General in a letter, Ex. 28, also described as Ex. U, that as B. Ram Chander Sahai was confirmed as Office Superintendent on 24th July 1933 and as the pay of the post on that date was Rs. 300 he should have, in view of fundamental R. 19, been allowed from 24th July 1933 the presumptive pay of the post, namely, Rs. 300 and on 1st April 1934, when the revised scale of pay actually did come into force, his pay in the revised scale should, under the fundamental R. 23, have been fixed at the maximum scale, namely, Rs. 300 and that his pay might now be regularized accordingly. On this letter the then Executive Officer, Major Kelan, made a note as follows :

"B. Ram Chander Sahai is entitled to Rs. 300 per month from the date of his appointment as office Superintendent and the matter may be brought up at the time of his retirement."

[4] At that date B. Ram Chander Sahai was already on extension having passed the age of 55 and no doubt the Executive Officer thought that he would be retiring in another six months (i. e. from 20th May 1937) so that consideration of the matter would not be long delayed. Actually B. Ram Chander Sahai got another extension up to 20th May 1938 and it was not until 21st February 1938 that he applied for leave pending retirement and also asked to be paid his arrears of pay in accordance with the terms of the Accountant-General's letter, Ex. 28. In due course the plaintiff retired with effect from 21st May 1938, but his application for arrears of pay remained undisposed of until on 21st December 1938 by its resolution of that date the Board declined to grant to him the arrears due. The plaintiff evidently had immediate information of this resolution and on the following day, 22nd December, he gave a notice to the Board, such as would be required if the provisions of S. 273, Cantonments Act were ap-



applicable to the case. The formal intimation of the Board's decision was conveyed to the plaintiff on 19th January 1939, but it was not until 19th September 1939 that the plaintiff instituted his suit claiming arrears of pay from 24th July 1933 upto 20th May 1938, a total sum of Rupees 2,520-5-10 out of which he relinquished Rs. 20-5-10 possibly because it was not worth while to pay additional court-fee for that amount.

[5] The main defences that were taken were that the plaintiff was employed by the Board as Office Supdt. on a salary of Rs. 225 and not on Rs. 300, that the pay of the post at the time of his appointment was not Rs. 300, that the plaintiff himself was estopped because it was due to his conduct that the new scale of 1926 was not referred to the Eastern Command before he was made permanent, and that the suit was barred by limitation under the provisions of S. 273 (3), Cantonments Act. The trial Court held against the Board on all points and holding that for purposes of limitation the suit was governed by Art. 120, Limitation Act, it gave the plaintiff a decree for Rs. 2306-1-6 holding that the arrears for the period from 24-7-1933 to 24-8-1933 only were time-barred. On appeal the learned Additional District Judge held that the sanctioned pay of the Office Superintendent at the time of the plaintiff's appointment was Rs. 300 per month, that the scale fixed by the Board in 1926 was inoperative for want of sanction of the Eastern Command and the plaintiff was entitled to receive Rs. 300 per month as Office Superintendent from the date of his appointment. On the question of estoppel, he held that there could be no estoppel to defeat a plain provision of law, and that although in this case the position of the Board was altered for the worse by plaintiff's conduct, the plaintiff was not estopped from claiming salary at the rate of Rs. 300 per month from the date of his appointment as Office Superintendent. No serious attempt has been made to contest any of these findings in this Court.

[6] On the question of limitation the learned Additional District Judge held that the case came within the mischief of S. 273, Cantonments Act. Section 273 (1) prescribes that "no suit shall be instituted against any Board ... in respect of any act done or purporting to have been done in pursuance of this Act or of any rule or bye-law made thereunder until the expiration of two months after notice in writing has been left at the office of the Board" while S. 273 (3) prescribes that "no suit, such as is described in sub-s. (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be instituted after the expiry of six months from the date on

which the cause of action arises." The effect of these two provisions and similar provisions in other Acts, has been held to be that a plaintiff is entitled to institute his suit within 8 months of the date of the accruing of the cause of action after having delivered notice to the Board not less than 2 months prior to the institution of the suit. In the present case it is clear that the plaintiff gave his notice to the Board on 22-12-1938, whereas the suit was not filed until 19-9-1939 more than 8 months after the cause of action had accrued.

[7] As we have remarked earlier, the finding that the pay of the post prior to the appointment of the appellant was Rs. 300 is in the nature of a finding of fact and has not been sought to be questioned in this appeal, nor has the question of estoppel been argued. Owing to the death of the appellant, the appeal has come up before us on two occasions and it was not disputed that the only question for argument was the question of limitation on the finding in regard to which the learned Additional District Judge dismissed the plaintiff's suit. The questions which arise, put shortly, are whether S. 273, Cantonments Act, applies to this suit. If not, what Article of the Limitation Act does apply and what part of the claim is within time? The learned Munsif was of opinion that S. 273, Cantonments Act, was not applicable and that the suit was governed by Art. 120, Limitation Act. It has been conceded in this Court that it would be difficult to contend that the suit is governed by Art. 120, and the suit might be construed as governed by Art. 102 or Art. 115, Limitation Act. In either case the limitation is 3 years and in consequence the bulk of the plaintiff's claim is barred by limitation. Article 102 prescribes for a suit for wages not otherwise expressly provided for by this schedule, a period of 3 years which begins to run from the date when the wages accrue due. Article 115 prescribes for a suit for compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for, a period of 3 years' limitation which begins to run from the date when the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted has occurred (or where the breach is continuing) when it ceases. The present would not be a case of continuing breach but of successive breaches of contract occurring on the date of each monthly payment of salary.

[8] The question in this appeal really is as to the correct interpretation of S. 273 (1), Cantonments Act. That section provides as follows:

"No suit shall be instituted against any Board ... in respect of any act done, or purporting to have



been done, in pursuance of this Act, or of any rule or bye-law made thereunder, until the expiration of two months after notice in writing has been left at the office of the Board . . . . . and unless such notice states explicitly the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending plaintiff, and unless the plaint contains a statement that such notice has been so delivered or left."

[9] The learned Additional District Judge took the view that the plaintiff was appointed by the Board under the rules framed under the Cantonments Act and in fixing the salary of the plaintiff the Board certainly purported to act under such rules. He went on to say :

"It is true that the rules were not fully complied with by the Board in fixing the plaintiff's salary inasmuch as it was fixed without the requisite sanction of the Eastern Command. The Board's act may not be legally valid and effective, but it did purport to act under the rules framed under S. 280, Cantonments Act. The word 'purport' means profess or be intended to seem. It is not necessary that the Board when it purports to act in a manner under the rules should be fully authorised by the rules to act in that manner. In this case in my opinion as the Board purported to act under the rules framed under the Cantonments Act the suit is of the nature contemplated in sub-s. (1), S. 273 and the period of limitation prescribed for such suits is 6 months from the cause of action."

[10] He went on to hold that even considering that information of the Board's decision was not conveyed until 19th January, the suit was not within time, and indeed if the cause of action be deemed to have arisen on 19-1-1939, then it must be said that the suit was instituted without notice at all.

[11] On behalf of the appellant the contention put forward is that this case does not fall within the mischief of S. 273 (1) on the view that the suit is not in respect of an act done, or purporting to have been done in pursuance of this Act. This contention has been put upon the footing that in order to bring the suit within the scope of S. 273 (1) such an act or illegal omission must be with reference to the wrong performance or the non-performance of some duty cast upon the Board by the Act itself or by a rule made under the Act. Stress is to be laid upon the words "duty cast upon the Board". The suit must, it is said, have some reference to an act enjoined by the Act and not some act which the Act empowers the Board to do. The plaintiff's claim rests upon the footing that by enlisting him in its service the Board entered into an implied contract to pay him the scales of pay validly fixed by it for the posts on its establishment, subject of course to the proviso that the Board necessarily has the power to alter the scale of pay of a post so as to affect future incumbents of the post, but not so as to affect the existing incumbent of it. His case was that by a resolution of the Board duly sanction-

ed by the Eastern Command the pay of the post of Office Superintendent had in the time of Mr. Palman been fixed at Rs. 300 and was still so fixed at the time of his appointment to and confirmation on that post. His case further was that in view of the sanctioned scale his appointment and confirmation on Rs. 225 was a mere mistake which the Board was bound to rectify and that as the Board had fixed rates of pay for its establishment his acceptance from the Board of Rs. 225 and of other rates of pay less than Rs. 300 did not and could not amount to a simple contract by which he was bound.

[12] Section 273, Cantonments Act, like S. 326, Municipalities Act, S. 192, District Boards Act, S. 80, Civil P. C. and the English Public Authorities Protection Act, makes provision for the protection of public authorities by cutting down the period of limitation within which suits of particular kinds must be instituted against the board and by providing that no such suit shall be instituted without a notice delivered not less than two months prior to the institution of the suit. The object of these two provisions is to give these public authorities an opportunity to settle such claims without suit and to afford them protection against suits filed after considerable delay with the result that the burden falls upon a different set of tax-payers and not upon the body of tax-payers as it existed at the date of the cause of action. The wordings of these different Acts are not identical, but the wording of the Cantonments Act closely follows the provisions of the Public Authorities Protection Act, 1893. Section 1 of that Act provides as follows :

"Where after the commencement of this Act any action, prosecution or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect :

(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in a case of continuance of injury or damage, within six months next after the ceasing thereof."

[13] The preamble to the Act indicated that these provisions had reference not to the public generally but to public authorities and public officers. One possible view of the wording of the Public Authorities Protection Act and S. 273, Cantonments Act is that it extends generally to all acts of a Cantonment Board which it does in pursuance of the Act, that is, within the scope not merely of its duty but also of its powers under the Act, and it has often been urged that this wider view should be taken. But there is



a strong consensus of opinion expressed in decisions of the Courts in England, and indeed also in India, that this is not the correct view. The view which has been adopted by the Courts is that it is to acts which the Board has not merely the authority, but also the duty to perform, that is, acts which are enjoined upon the Board that the protection afforded by S. 273 or the Public Authorities Protection Act extends.

[14] There was at one time a view held that the limitation imposed by this Act was applicable only to acts giving rise to a claim in tort and not a claim resting on contract or implied contract, but that view has now been rejected and need not be considered in the present case. We have, therefore, only to consider whether a breach of contract or of implied contract, such as that which is pleaded by the plaintiff, does or does not come within the protection of S. 273. In Halsbury's Laws of England, Hailsham Edn. Vol. XXVI, P. 294, para. 612, in the section which is concerned with the execution of a statute, duty or a authority, dealing with the Public Authorities Protection Act, 1893, we find the following statement :

"The performance, or breach, of a contract which a public authority has the power, but not the duty, to make is not within the protection of the Public Authorities Protection Act."

[15] This has been accepted as a correct statement of the law, for example, in [Compton v. West Ham County Borough Council] (1939) 3 ALL. E. R. 193.<sup>1</sup> In his judgment in that case Crossman J. remarked :

"I think that it is only a breach of contract which a public authority has the power, but not the duty, to make which is not within the Act."

[16] To apply the principle of this decision to the Cantonments Act we note that the Act requires that a Board should have an Executive Officer. It follows that the Board must appoint an Executive Officer and if in regard to the contract between such an Executive Officer and the Board there should arise a dispute, the Board will be entitled to the benefit of S. 273 of the Act. On the other hand, although S. 280, Cantonments Act provides for the making by the Central Government of rules relating to the appointment, control, supervision, suspension, removal, dismissal and punishment of servants of Boards, and although obviously the appointment of servants is necessary to enable the Board to perform its duties, there is nothing in the Act which enjoins upon the Board, that is, which makes it the duty of the Board to appoint a servant. It has the authority or power to make such appointment but it has not a corresponding duty.

[17] In support of this view of the correct

interpretation of the words "in pursuance of the Act" in S. 273, Cantonments Act, we have been referred to a number of cases. In [Sharpington v. Fulham Guardians] (1904) 2 Ch. 449,<sup>2</sup> a case against a Board of Guardians arising out of a building contract, it was held that the plaintiff's claim was in respect of a private duty arising out of a contract, not for any negligence in performing a statutory or public duty, and therefore the Public Authorities Protection Act did not apply. Farewell J. remarked that the Guardians in order to carry out their duty had a power to build a house or alter a house, and they accordingly entered into a private contract. He remarked that it was a breach of this private contract that was complained of in this action and not a complaint by a member of the public in respect of the public duty of the Guardians. It was a complaint by a private individual in respect of a private injury done to him. The only way in which the public duty came in at all was that if it were not for the public duty any such contract (entered into by the Guardians) would be *ultra vires*. But that would apply to every contract. He concluded by saying

"I cannot find any ground for saying that this particular contract comes within the Act. I think it is clear that what is complained of is a breach of a private duty of the guardians to a private individual. The result is that, so far as this section is concerned, the action will lie"

that is to say, the suit was not barred by limitation. This decision clearly negatives the view that anything done by a Board which is not *ultra vires* of the Act from which it derives its authority, must be "in pursuance of the Act."

[18] [McManus v. Bowes] (1937) 3 ALL E. R. 227<sup>3</sup> was a case relating to the removal of a person required by a particular Act to be employed, the removal being made also under a power conferred by the Act. It was held that the provisions of the Public Authorities Protection Act were applicable and limitation for filing a suit reduced to 6 months, because the appointment and removal of the plaintiff were directly traceable to the statute. Again in (1939) 3 ALL E. R. 193 corresponding to (1939) Ch.D. 771,<sup>1</sup> it was held that if a local authority commits any breach of a contract which under an Act of Parliament, it is its duty to make, then the local authority can claim the protection of the Public Authorities Protection Act, 1893, if any action or proceeding against it for the breach of such a contract is not brought within the limit of time prescribed by the Act. Crossman J, summed up his conclusions as follows :

"Thus, the appointment of the plaintiff was an appointment which the defendant council were bound to

1. (1939) 1939 Ch. 771 : 108 L. J. Ch. 300 (304) : 160 L. T. 633 : 1939-3 All. E. R. 193.

2. (1904) 2 Ch. 449 (456) : 73 L. J. Ch. 777 : 91 L. T. 739 : 52 W. R. 617.  
3. (1937) 3 All. E. R. 227 (233) : 157 L. T. 385.



make under the Act. The action here has arisen in consequence of that appointment, and it seems to me that the best conclusion at which I can arrive as to the meaning of S. 1 of the Act (the Public Authorities Protection Act) is that the section does apply to an action which is to remedy a breach of a contract which the defendant council were bound to make in pursuance of the Poor Law Act, 1930, and the regulations thereunder."

[19] The most interesting of the cases under the Public Authorities Protection Act which has been put before us is the decision of the House of Lords in [*Bradford Corporation v. Myers*] (1916) 1 A. C. 242.<sup>4</sup> That, like the case in (1904) 2 Ch. 449,<sup>2</sup> arose out of a contract which the defendant Corporation had authority to make but were not directed by the statute to enter into. The headnote runs as follows:

"The defendants, a municipal corporation, were authorised by Act of Parliament to carry on the undertaking of a gas company and were bound to supply gas to the inhabitants of the district, and they were also empowered to sell the coke produced in the manufacture of the gas. The defendants contracted to sell and deliver a ton of coke to the plaintiff, and by the negligence of their agent, the coke was shot through the plaintiff's shop window. More than six months afterwards the plaintiffs commenced an action of negligence against the defendants. The defendants pleaded S. 1, Public Authorities Protection Act, 1893, as a bar to the action."

[20] It was held that "the act complained of was not an act done in the direct execution of a statute, or in the discharge of a public duty or the exercise of a public authority and that the Public Authorities Protection Act, 1893, afforded no defence to the action."

[21] In the speech of Lord Buckmaster at p. 247 we find the following remarks:

"While the preamble is necessary thus to restrict the meaning of the persons whom the statute is intended to protect the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform. In other words, it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply."

[22] In his speech Viscount Haldane referring to the Judgment of Farewell J. in (1904) 2 Ch. 449<sup>2</sup> remarked:

"I think that Farewell J. was right. For it seems to me that the language of S. 1 does not extend to an act which is done merely incidentally and in the sense that it is the direct result, not of the public duty or authority as such, but of some contract which it may be that such duty or authority put it into the power of a public body to make, but which it need not have made at all."

4. (1916) 1 A. C. 242 (260) : 85 L. J. K. B. 146 : 114 L. T. 83.

[23] Again Lord Atkinson in his speech remarked:

"And, moreover, though a statute may create a corporation for a certain purpose statutes somewhat similar to the Public Authorities Protection Act, 1893, have been held not to apply to the breach by such bodies of duties imposed upon them by the common law, not by the statute, while if the duties which the common law would of itself impose are also imposed by statute then statutes such as the Public Authorities Protection Act would apply."

[24] He went on to quote the remarks made by Vaughan Williams L. J., in *Lyles v. South-end-on-Sea Corporation*, (1905) 2 K. B. 1;<sup>5</sup> where he said:

"Now, I do not think that it can have been the intention of the Legislature that every act done by the corporation which was intra vires conferred by this Order (the Light Railways Order, 1899) should be subject to the protection afforded by this Act (the Public Authorities Protection Act). In my judgment an act which is done, not only in pursuance or execution, or intended execution, of this Light Railways Order, but also in pursuance or execution, or intended execution, of some obligation incurred by public authority voluntarily beyond the obligation cast upon them by the Order, is not an act done in pursuance or execution, or intended execution, of the Order."

[24] Lord Atkinson went on to say further:

"I think that the negligent act complained of here was not done in pursuance or execution or intended execution of any Act of Parliament, since there was no statutory obligation on the appellants to do it".

[25] The last speech in this case delivered by Lord Shaw of Dunfermline who incidentally dealt with the distinction between cases arising out of breach of contract and cases arising out of tort and in this connection remarked:

"The same principle applies whether the act complained of arose through breach of contract or through tort. I take no stock of such distinction for the Act does not; it speaks of an act done."

[26] Elsewhere in his speech Lord Shaw distinguished between the right given and the duty imposed upon the corporation of supplying gas to the inhabitants of Bradford and the right to sell and dispose of the coke and he went on to say:

"It is not enough that the neglect occurs in the doing of a thing which is authorised by statute, but the thing done is not every or any thing done but must be something in the execution of a public duty or authority, and it is only neglect in the execution of any such duty or authority that is covered by the statute".

[27] Again remarked:

"This restriction appears to me to be vital. The Act seems to say that there are many things which a public authority, clothed, say, with statutory power, may do, which the limitation will not cover, but when the act or neglect had reference to the execution of their public duty or authority—something founded truly on their statutory powers or their public position to that, and that only, will the limitation apply".

[28] Later on (at page 263) he remarked:

"I will venture to add, my Lords, that it will be found that the position, not of the one party, but of

5. (1905) 2 K. B. 1 (13) : 74 L. J. K. B. 484 : 92 L. T. 586.



both parties must rest on the same foundation. If there be a duty arising from statute or the exercise of a public function there is a correlative right similarly arising. A municipal tramway car depends for its existence and conduct on, say, a private and many public acts, and the corporation in running it is performing a public duty. When a citizen boards such a car, in one sense he makes, by paying his fare, a contract, but the boarding of the car, the payment of the fare, and the charging of the corporation with the responsibility for safe carriage are all matter of right on the part of the passenger, a public right of a carriage which he shares with all his fellow citizens, correlative to the public duty which the corporation owes to all. Similarly, when a municipality, by virtue of private and public statutes, carries on a gas undertaking, the public duty of manufacture and supply finds its correlative in the right of the consumer, a public right which he has in common with all his fellow house-holders, to supply and to service. In both of these cases, accordingly, the Public Authorities Protection Act applies. But where the right of the individual cannot be correlated with a statutory or public duty to the individual, the foundation of the relations of parties does not lie in anything but a private bargain which it was open for either the municipality or the individual citizen, consumer, or customer to enter into or to decline. And an action on either side founded on the performance or non-performance of that contract is one to which the Protection Act does not apply, because the appeal, which is made to Court of Law, does not rest on statutory or public duty, but merely on a private and individual bargain."

[29] In the light of these decisions, it appears to us that in the present case it would be difficult to hold S. 273 (1), Cantonments Act, to be applicable. Had the case been one of a suit of an exactly similar nature filed by the Executive Officer, whose appointment it is the duty of the Board to make whereas the employing of the plaintiff was as it were an incidental act or an act of internal administration, we should have been inclined to hold the Act to be applicable. We have not been able to derive much assistance from the earlier cases of this Court. For the most part of these cases were not decided under the Cantonments Act, but under the Municipalities Act or the District Boards Act, the provisions of which are worded differently. For example, in [*Municipal Board, Agra v. Ram Kishan*] 1933 A. L. J. 1414,<sup>6</sup> it was held that the period of limitation of 6 months under S. 326, Municipalities Act, was not intended to apply to a suit on contract. Bennet J. at p. 1416 remarked:

"The reason why we consider that this suit does not come under S. 326 is that it is not a suit in tort but it is a suit in contract and we consider that a suit in contract is not one contemplated by S. 326."

[30] On the other hand, he went on to quote from the decision of the House of Lords in (1916) 1 A. C. 242<sup>4</sup> referred to above and the speech of Lord Haldane and thereafter he remarked:

"In other words, this view of law treats a municipal body and its officers and servants on the

same footing as private individuals when they enter into a contract."

[31] For the reasons we have given earlier, we should consider this statement to be much too wide. A case of more directly applicable is [*Cantonment Board Allahabad v. Hazari Lal Ganga Pd.*] 1934 A. L. J. 805,<sup>7</sup> in which it was held that a suit for recovery of the value of goods supplied to a Cantonment Board does not fall within the description of suits mentioned under S. 273 (1), Cantonments Act, and Art. 52, Limitation Act applies to such a suit. At page 807, Sulaiman J. remarked:

"No doubt under S. 12, Cantonments Act a Cantonment Board is empowered to acquire and hold property both moveable and immovable and to contract. It is also clear that the purchase made by the Board was by virtue of the power vested in it under the Cantonments Act. But I am unable to regard the suit of the plaintiff against the Board as a suit in respect of an act done by the Board in pursuance of the Act itself as distinct from an act done in the exercise of the power granted to the Board under the Act."

[32] We infer that Sulaiman, C. J. interpreted "act done by the Board in pursuance of the Act" as meaning an act enjoined upon the Board by the Act. The Full Bench case in [*District Board, Allahabad v. Behari Lal*] 1935 A. L. J. 1214<sup>8</sup> was a case under S. 182 (1), District Boards Act. In the last paragraph of the leading judgment in this case, Sulaiman C. J. remarked:

"I do not consider it necessary to refer to the English cases under the Public Authorities Protection Act, 1893. though it may be observed that it appears to have been generally held in England that private contracts entered into by public authorities would not be 'acts done in pursuance or execution of any Act of Parliament or of any public duty or authority, etc.'"

[33] On behalf of the respondent Mr. Gurtu has contended first that this was a private bargain between the Board and the plaintiff-appellant by which the appellant accepted a pay of Rs. 225 per mensem in the scale sanctioned by the Board in 1926. We are not impressed by this contention. He goes on, however, to contend that if the basis of the plaintiff's cause of action is an implied contract by the Board to give to a person appointed to a certain post of a certain pay unless and until the Board makes an alteration of its own rules, in a legal manner then the plaintiff is in effect contending that the Board was bound by law to give him a pay of Rs. 300 if it appointed him to a post of which the pay was Rs. 300, that is, that there was a statutory rule not merely giving the Board authority to pay him so much, but also making it the duty of the Board to give him that pay. He seeks to put this contractual duty on the same footing as the duty of the Board to ap-

7. ('34) 21 A. I. R. 1934 All. 436 (437); 56 All. 885 : 149 I. C. 49 : 1934 A. L. J. 805.

8. ('36) 23 A. I. R. 1936 All. 18 (21) : 58 All. 569 : 160 I. C. 226 : 1935 A. L. J. 1214 (F. B.).

6. ('33) 20 A. I. R. 1933 All. 785 (787) : 55 All. 1002 : 147 I. C. 186 : 1933 A. L. J. 1414.



point an Executive Officer and pay him according to the rates fixed by itself or by the Central Government. We do not think that this argument is sound. The relation between the Board and the Executive Officer rests upon the statutory duty to make an appointment of an Executive Officer but the relation between the Board and its ministerial servants arises out of its power to appoint such servants to facilitate the carrying out of its duties. The obligation to pay a certain rate of pay fixed in accordance with the rules arises not out of the statute but out of the implied contract between the parties; whereas in the case of an Executive Officer the Board cannot change its mind about making an appointment of an Executive Officer and decide not to appoint one. The Board could in the year 1933 have decided not to appoint any one to the post of Office Superintendent, or it could have decided to postpone the appointment until such time as the new scales had been sanctioned by the Eastern Command. In our judgment, the fact that the Board if it appointed someone to the post of Office Superintendent then vacant, was bound by its own rules to give him the pay of the post, does not bring the case within the scope of S. 273 (1) because there was no statutory obligation on or duty of the Board to make the appointment at all.

[34] On a full consideration of the decisions, we hold that the provisions of S. 273 (1), Cantonments Act, were not applicable to the present case and the decree of the learned Additional District Judge dismissing the plaintiff's suit must, therefore, be set aside. We have felt some doubt in this case on the question what is the appropriate order to make as to costs. On the whole we see no reason why the Board, which merely represents the tax-payer, should not be treated in exactly the same way as any other litigant. The plaintiff began by claiming in this suit a far larger sum than that for which in law he could maintain his claim. Had he given notice of claim or filed his suit for the now agreed sum of Rs. 427 only the Board might well have decided to pay him and not to contest the claim. In allowing this appeal therefore we direct that the plaintiff's claim be decreed for Rs. 427 only. Parties will receive and pay costs throughout in proportion to their success and failure.

D.S./D.H.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 49 [C.N.25]**  
PATHAK J.

*M. Mohd. Sharif — Plaintiff — Appellant v. Waqf Banam-i-Khuda through Abdul Rashid — Defendant — Respondent.*

Second Appeal No. 2407 of 1944, Decided on 7th December 1945, from decision of Sm. C. C. Judge, Meerut, D/- 16th May 1944.

(a) Transfer of Property Act (1882), S. 108 (j) — Section merely enacted pre-existing law — Leasehold interest created before passing of Act is transferable.

Section 108, Transfer of Property Act, only declared the law as previously administered. A leasehold interest was alienable even before the Transfer of Property Act, as there was no rule of law imposing restriction upon such a transfer. Hence, a permanent lessee under a lease created before the passing of Transfer of Property Act, is competent to alienate his interest. ('24) 11 A. I. R. 1924 Cal. 1012, *Distinguished*.

[Para 3]

(b) Transfer of Property Act (1882), S. 111 — Wakf by tenant — No forfeiture of tenancy.

A wakf created by a tenant is not such a dealing with the property as to entail a forfeiture of tenancy.

[Para 3]

T. P. Act —

('45) Chitaley, S. 108 (j). N. 1, Pt. 2.

('36) Mulla, Pages 611, 612.

S. A. Rafiqua — for Appellant.

Ambika Prasad and P. L. Kshetry —

for Respondent.

**Judgment.**—This appeal arises out of a suit for possession over the site of a certain house by demolition of the structures existing on that site and for recovery of Rs. 5-4-0 on account of the use and occupation of the said site. To that suit Allahdia was originally impleaded as a defendant and after his death which took place during the pendency of the suit Abdul Rashid was impleaded as the mutwalli and later on the waqf was also added in the array of defendants. The plaintiff's case is that he is the owner of the site in question of which Allahdia was the tenant on behalf of the plaintiff on a monthly rent of annas four and as the said Allahdia made a waqf of the house he forfeited his tenancy rights. In defence, the title of the plaintiff to the site in question was admitted but it was averred that Allahdia was a permanent lessee and, as such, he was competent to make the waqf. It was further urged that the plaintiff accepted rent from the defendants with full knowledge of the waqf and was consequently estopped from challenging the waqf. In the Court of first instance, it was conceded on behalf of the plaintiff that Allahdiya was a permanent lessee but it was contended that his rights were inalienable. Upon the question as to whether the rights of Allahdia were transferable or not that Court came to the conclusion that although the lease in question was created prior to the passing of the Transfer of Property Act the law applicable to such leases is the same as has been laid down in S. 108 (j), T. P. Act and for this proposition reliance was placed upon the ruling, [Joti Prasad v. Har Prasad] 1932 A.L.J. 567.<sup>1</sup> Upon the question of the effect of acceptance of rent by the plaintiff after the creation of the waqf the Court of the first instance was of the

1. ('32) 19 A.I.R. 1932 All. 473 : 139 I. C. 346 : 1932 A.L.J. 567.



opinion that even if there had been any forfeiture on the ground alleged by the plaintiff, it had been waived. In the result, that Court dismissed the claim for possession over the site but decreed the claim for arrears of rent. From this decree, the plaintiff preferred an appeal to the lower appellate Court. That Court, in its turn, reached the conclusion that the creation of the *waqf* did not entail a forfeiture of the tenancy. It also affirmed the finding of the Court of first instance on the question of waiver of forfeiture. From this decree of the lower appellate Court, the plaintiff has come up in appeal to this Court.

[2] The arguments which had been advanced before the Courts below have been reiterated before me and it has been contended that a permanent lease created before the passing of the Transfer of Property Act does not confer transferable rights upon the lessee. For this proposition, reliance is placed upon the rulings reported in [*Safar Ali Mian v. Abdul Rashid Khan*] A. I. R. 1924 Cal. 1012<sup>2</sup> and [*Bansi Singh v. Chakradhar Prasad*] 179 I. C. 566.<sup>3</sup> On behalf of the respondent, it has been contended that the law relating to homestead land in Bengal is peculiar and is not applicable to the present case. Reference has been made by Mr. Panna Lal Khatri to Mulla's Transfer of Property Act, Edn. 2, pages 611 and 612 where it is stated that:

"In English law a tenant can, as an ordinary incident of the estate granted to him, both assign his term and create sub-tenancies and except as to some non-transferable agricultural tenancies, this has been the law in India both before and after the Act."

[3] This statement of the law is in accord with the ruling reported in 1932 A. L. J. 567,<sup>1</sup> where a Bench consisting of Pullan and Niamat Ullah JJ. held that S. 108 (j), T. P. Act, merely enacted the pre-existing law. Sitting singly I am bound to follow this decision and it is not necessary for me to discuss the question at length. Muttusami Ayyar J. observed in [*Appa Rau v. Subbana*] 13 Mad. 60<sup>4</sup> that in the absence of a covenant not to assign, a tenancy is presumably a saleable interest. He also observed that S. 108, T. P. Act, only declared the law as previously administered. The policy of the law is to promote free alienation of property and transferability of property is the general rule. In the absence of some provision of law or custom having the force of law prohibiting transfer, all rights in property are transferable. Leasehold interest is property and, therefore, was alienable even before the Transfer of Property Act as there was no rule of law imposing restriction upon such a transfer. With regard to the rulings of the Calcutta High

Court relating to tenancy of homestead land created before the passing of the Transfer of Property Act, Sir Dinshah Mulla, in the Transfer of Property Act, Edn. 2, page 612, states that such tenancies are not transferable except by custom. I am in agreement with this observation and for this reason, in my opinion, the view taken in A. I. R. 1924 Cal. 1012<sup>2</sup> has no application to the present case. Some argument was advanced upon the question of the nature of a *waqf* under the Muhammedan law. The definition of *waqf* contained in the Waqfs Act may be accepted as representing the meaning now attached to the word in the Courts. In that Act *waqf* has been defined as meaning a permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable. The Almighty being a juristic person, the dedication in his favour has been treated as a transfer governed by the ordinary law of transfer [see *Ahmad Husain v. Kallu Mian*] 1929 A. L. J. 460.<sup>5</sup> I am not satisfied that a *waqf* created by a tenant is such a dealing with the property as to entail a forfeiture of tenancy. Learned counsel for the appellant then argued that the finding on the question of waiver of forfeiture is vitiated. I am unable to accept this contention as nothing has been shown to me to persuade me to hold that the finding that the rent was accepted by the plaintiff after the alleged forfeiture with full knowledge of the fact that the *waqf* had been made was arrived at on a misreading of evidence. That finding being based upon evidence on the record is binding upon me. For the reasons stated above, I am of opinion that there is no substance in this appeal and I, therefore, dismiss it with costs. Leave to file an appeal under the Letters Patent is prayed for by learned counsel for the appellant and is refused.

G.B./D.H.

*Appeal dismissed.*

5. ('29) 16 A. I. R. 1929 All. 277 : 117 I. C. 97 : 1929 A. L. J. 460.

**A. I. R. (34) 1947 Allahabad 50 [C. N. 26]**  
YORKE J.

*Chandan Singh v. Surya Pal Singh.*

Second Appeal No. 1690 of 1944, Decided on 12th October 1945, from decision of Temporary Civil Judge, Etah, D/- 15th October 1941.

U. P. Stayed Arrears of Rent (Remission) Act (18 [XVIII] of 1939), S. 5—Rent payable by tenant—What is, stated.

The rent payable by a tenant within the meaning of S. 5 is his share of all the rents of all the holdings in which he is a tenant. ('44) 31 A. I. R. 1944 All. 170 (F. B.), followed.

P. M. Verma—for Appellants.

D. Sanyal—for Respondent.

**Judgment.**—This second appeal is concluded by a decision of a Full Bench of this Court. The

2. ('24) 11 A. I. R. 1924 Cal. 1012 : 84 I. C. 28.

3. ('38) 25 A. I. R. 1938 Pat. 569:17 Pat.358:179 I. C. 566.

4. ('90) 13 Mad. 60.

[Para 1]



plaintiff, Raja Surya Pal Singh had sued to recover arrears of rent of the years Rabi 1342, 1343, Kharif 1344, 1345, 1346 and 1347 Fasli under the provisions of the U. P. Tenancy Act 1939. The suit was not contested, but the Court had to consider the question whether the arrears of rent of years prior to the year 1345 Fasli were or were not affected by the provisions of the U. P. Stayed Arrears of Rent (Remission) Act (Act 18 [XVIII] of 1939), inasmuch as the institution of any suit at the appropriate date for the recovery of those arrears had been or would have been stayed under the provisions of the U. P. Stay of Proceedings (Revenue Courts) Act, 1937. Section 5 of Act 18 [XVIII] of 1939, provides that the provisions of S. 3 of this Act, (which remits those stayed arrears) shall not apply to a suit or application instituted or made against any person the rent payable by whom in the year 1344 Fasli was more than five hundred rupees. In regard to this provision two views are possible. One is that as each and every tenant of a holding is jointly and severally liable for the whole rent of the holding, the rent payable by each and every tenant in respect of that holding for purposes of Act 18 [XVIII] of 1939 is the whole rent of the holding. The other possible view is that the rent of any individual co-sharer of such a holding is his proportionate share of the total rent. The view which was taken by the learned Assistant Collector was the latter view, but on the case going in appeal to the Temporary Civil Judge of Aligarh at Etah, the latter held in favour of the former view and accordingly decreed the plaintiff's suit for arrears not only of 1345, 1346 and 1347 Fasli but also of 1342, 1343 and 1344 Fasli. Subsequent to that decree there has been a decision by a Full Bench of this Court in [*Surya Pal Singh v. Chiranjit*] 1944 A.L.J. 288<sup>1</sup> by which it has been held that the rent payable by a tenant within the meaning of S. 5 of the Stayed Arrears of Rent (Remission) Act (Local Act 18 [XVIII] of 1939), is his share of all the rents of all the holdings in which he is a tenant. That decision *prima facie* concludes the present case and has the result that the decree of the lower appellate Court must be set aside and the decree of the trial Court restored.

[2] On behalf of the respondent, however, it has been urged, by Mr. Sanyal, that there may have been other tenancy holdings in which the defendants or some of them were tenants of other zamindars paying so much rent that it would have raised the rent payable by them to more than Rs. 500. It will be sufficient to say that had this been the case, it should have been taken in the grounds of appeal in the lower

1. ('44) 31 A. I. R. 1944 All. 170 : I L R (1944) All 461 : 214 I. C. 213 : 1944 A. L. J. 288 (F B).

appellate Court and it should have been said that not only was the decision of the Assistant Collector wrong because he had adopted an incorrect interpretation of S. 5 of the Act, but it was also wrong because the defendants by reason of their having holdings in the zamindari of other landlords were even on that view in the position that the rent payable by them was in excess of Rs. 500. As that point was not taken in the lower appellate Court, I am not prepared to entertain it at this stage. In my judgment this appeal must succeed. I accordingly allow this appeal, set aside the decree of the lower appellate Court and restore the decree of the trial Court. The appellants will be entitled to their costs in this Court and the Court below. The order of the trial Court in regard to costs will stand. Mr. Sanyal asks me to make an order under the proviso to S. 3 of Act 18 [XVIII] of 1939, for the refund of court-fees, but in my judgment such an order cannot be passed because the present suit is not a suit which had actually been stayed under the provisions of the U. P. Stay of Proceedings Act of 1937.

N.S./D.H.

*Appeal allowed.***A. I. R. (34) 1947 Allahabad 51 [C. N. 27]**

ALLSOP AG. C. J. AND MATHUR J.

*L. Hari Kishan Das v. Emperor.*

Criminal Revn. No. 589 of 1946, Decided on 8th April 1946, from order of Sessions Judge, Saharanpur, D/- 10th January 1946.

Criminal P. C. (1898), S. 439 — Order of Town Rationing Officer under R. 81, Defence of India Rules—High Court has no jurisdiction to interfere.

High Court as a Court of criminal revision has no jurisdiction to interfere with an order of Town Rationing Officer, who is also a Magistrate, made under R. 81 of the Defence of India Rules, as such an order is not made by the Town Rationing Officer in his magisterial capacity : ('45) 32 A. I. R. 1945 Bom. 385, *Dissent*.

[Para 1]

Cr. P. C. —

('41) Chitaley, S. 439, N. 8.

C. B. Agarwala — for Applicant.

**Allsop Ag. C. J.** — This is an application purporting to be one addressed to us in our revisional jurisdiction. The applicant urges that we should set aside an order of the Town Rationing Officer made under R. 81 of the Rules under the Defence of India Act. It is urged that the order has been passed by the Town Rationing Officer who is a Magistrate. It does not seem to us that we have any jurisdiction to interfere with his order in our capacity as a Court of revision under the Code of Criminal Procedure. The Rule is that the Central Government or the Provincial Government can make an order dealing with certain matters. In this case the relevant matter is the control of house accommodation. There is also provision in the Defence of India Act, sub-s. (5) of S. 2, that the powers



of a Provincial Government can be delegated by them to some other authority. There is nothing to show that that authority must be a Magistrate. It is perfectly clear that this was not an order passed by the Town Rationing Officer in his magisterial capacity and that we have no power to interfere as a Court of criminal revision. Our attention has been drawn to the case in [Motichand Balubhai v. District Magistrate, Surat] A. I. R. 1945 Bom. 385.<sup>1</sup> In that case the High Court of Bombay assumed jurisdiction in similar circumstances, but the question of their jurisdiction does not seem to have been raised as it was not discussed. If it had been raised, we doubt whether the learned Judges would have assumed jurisdiction, but if they did consider the matter and came to the conclusion that they had jurisdiction as a Court of criminal revision, we may say with the greatest respect that we are unable to agree with them. We reject this application.

D.S./D.H.

*Application rejected.*

1. ('45) 32 A. I. R. 1945 Bom. 385.

**A. I. R. (34) 1947 Allahabad 52 [C. N. 28]**

MALIK AND WALI-ULLAH JJ.

*Lachmi Chand v. Madanlal Khemka.*

First Appeal No. 446 of 1943, De'd on 25-4-1946, from order of Civil Judge, Dehra Dun, D/- 21-7-1943.

Negotiable Instruments Act (1881), Ss. 8 and 78 — Scope of — Term "holder" does not include beneficial owner — Suit on note can be instituted only by holder — To entitle beneficial owner to sue he must be able to obtain discharge from maker. — Suit by beneficial owner to which holder is not party is not maintainable.

Reading Ss. 8 and 78 together it is clear that the person to whom the payment should be made in order to discharge the maker or the acceptor from all liability under the instrument is the holder of the instrument or his accredited agent, such as a banker acting as an agent for collection. The holder of the promissory note is essentially the person who is entitled in his own name. The words "entitled in his own name" are most significant. The term "holder" does not include a person who though in possession of the instrument has not the right to recover the amount due thereon from the parties thereto. Thus, in order to discharge the maker or the acceptor from liability payment must be made to the payee or the holder of the instrument. [Para 7]

By virtue of S. 48 of the Act, the property or ownership in a pro-note including the right to recover the amount due thereon is vested in the holder of the note. A valid discharge can be given to the maker or acceptor of the instrument only by the payee of the note or the holder thereof. There is no such thing for this purpose as a benami promissory note taken in the name of one person but really meant for the benefit of another. Thus, where a hand note is executed in favour of a benamidar it is not open to the promisor to assert that the holder of the note is not the beneficial owner. Conversely, if a suit is to be based upon the note it must be instituted by the holder whose name appears on the note and not by any person who alleges that the origi-

nal holder is his benamidar and that he is the beneficial owner. *Case law discussed and relied on.* [Paras 7, 8]

Section 78 however does not deal with the right of suit, and hence the real owner of the note can sue on the note provided he is in a position to obtain a good discharge from liability from the maker or acceptor of the note: ('31) 18 A. I. R. 1931 All. 108 *Rel. on;* *Case law discussed.* [Para 9]

Thus, where a pro-note was executed in favour of an individual person who was described as the owner and manager of a certain religious institution which later on became a registered society and a suit on the note was instituted in the name of the registered society through its secretary but the payee of the promissory note was not made a party to the suit:

*Held* that it could not be said that the plaintiff registered society was in a position to secure a discharge of the maker of the note from all liability under the note and hence the suit as brought was not maintainable. [Para 11]

*Dr. K. N. Katju, D. P. Uniyal and S. N. Katju*  
—for Appellant.

*H. P. Sen and K. B. L. Agarwal*—for Respondent.

**Wali Ullah J.** — This is an appeal by the defendants against the decree passed by the learned Civil Judge decreeing the claim due on the basis of a promissory note dated 25-8-1928. The suit was instituted by B. Madan Lal Khemka as Secretary of Baba Kali Kamliwala Panchaiti Kshetra, Rishikesh, a registered society under Act 21 of 1860. The two defendants impleaded were Lala Lachmi Chand and his son, Onkar Prasad. As mentioned above, the suit was decreed against the defendants, both of whom filed an appeal in this Court. Lala Lachmi Chand died during the pendency of the appeal leaving his son Onkar Prasad, appellant 2, as his sole legal representative. The position, therefore, is that Onkar Prasad is the sole appellant in this case.

[2] The case set out in the plaint was to this effect. A pro-note was executed by Lala Lachmi Chand, defendant-1, on 25-8-1928 for a sum of Rs. 10,000. The rate of interest stipulated was 12 annas per cent. per mensem. It was in favour of Shri 108 Baba Kali Kamliwala Ramnath Maniramji of Rishikesh. On 28-7-1930 a sum of Rs. 4800 was paid by defendant 1 through one Mt. Draupadi. On 25-8-1932 a fresh pro-note was executed in renewal of the previous pro-note by both Lala Lachmi Chand and Onkar Prasad for a sum of Rs. 8363 the total amount then found due. On 5-11-1934 another pro-note by way of renewal was executed for Rs. 9887-4-3. It was executed by Lala Lachmi Chand alone. In November 1937 another pro-note is said to have been executed in respect of the amount found due on the previous pro-note and handed over to the creditor. Along with this pro-note a letter (Ex. 5) dated 3-11-1937 acknowledging the liability for payment of Rs. 12,024-1-6 then due was sent over the signatures of both Lala Lachmi Chand and Onkar Prasad. Lastly, on



14-11-1939 a pro-note was executed by both Lachhmi Chand and Onkar Prasad for a sum of Rs. 13,302 11-9. This purported to be by way of renewal of the pre-existing liability under the former pro-note. The plaint was filed on 4-11-1942 with the allegations set out above and it was specifically stated in para. 7 of the plaint that the cause of action for the suit arose on 25-8-1928, the date of the original transaction, and it was stated that limitation was saved by reason of the subsequent acknowledgment in the form of pro-notes executed from time to time by the defendants in favour of the plaintiff.

[3] The defendants resisted the suit on various grounds. Of them the most material pleas were these: (i) The suit was misconceived inasmuch as the plaintiff was not a payee under the pro-note of 1928 and consequently was not entitled to sue under the provisions of the Negotiable Instruments Act; (ii) that the cause of action on the basis of the pro-note of 1928, as set out in the plaint, did not exist; and (iii) that in any event, the defendants were "agriculturists" and as such entitled to the benefit of the Agriculturists' Relief Act in the matter of reduction of interest and the grant of instalments. It may be mentioned here in passing that the plaintiff admitted that the defendants were agriculturists. It is also a matter of admission that both the defendants were members of a joint Hindu family and Lachhmi Chand was the Karta of that family.

[4] The facts, as set out in the plaint, were substantially admitted. The defendants led no oral evidence while the plaintiff contented himself with the production of one single witness Bishambhar Sahai, the Karinda of the plaintiff. Bishambhar Sahai produced the plaintiff's Bahi Khata from sambat 1995 to sambat 1998. His evidence was to the effect that the plaintiff's accounts were kept regularly and defendants accounts were sent to them regularly. His evidence was also intended to prove that all the loans advanced by Baba Ramnath Maniramji were actually advanced by the Kshetra Kali Kamliwala which was the real creditor. The documentary evidence in the case consists of various pro-notes executed from time to time and the correspondence exchanged between the parties as well as the statement of the defendants' accounts as they stood in the Bahi Khata of the plaintiff.

[5] The learned Civil Judge, on a consideration of the materials on the record, came to the conclusion that the defendants were "agriculturists" but that the plaintiff was not a "creditor" within the meaning of s. 32, Agriculturists' Relief Act. He also found that the interest claimed was not excessive and that owing to the declaration given by the plaintiff under S. 4,

Debt Redemption Act, the provisions of that Act were not applicable. He also recorded a finding that the loans advanced by Baba Ramnath Maniramji, including the loan in question in the present case, were advanced out of the funds of Kshetra Kali Kamliwala which is a religious and charitable institution at Rishikesh. On the main question, whether the plaintiff was debarred from suing on the pro-note dated 25-8-1928, the learned Civil Judge seems to have missed the real point which had to be decided. He came to the conclusion, to quote his own words, that "there was no legal defect in the plaint" and in view of the renewals of the original loan he held that the suit was within limitation. In view of the findings recorded by him, he decreed the claim with costs and *pendente lite* and future interest at 3 per cent. per annum payable by monthly instalments of Rs. 500 each, first instalment falling due on 1-9-1943. On failure to pay any of those instalments the whole amount due was directed to be recoverable at once. A large number of points have been raised in the memorandum of appeal. Of them the first and foremost point obviously is the question whether the plaintiff's suit, as framed, was maintainable. If it be held that the suit, as instituted, cannot succeed no other questions need be considered.

[6] Learned counsel for the appellant has strongly contended that the plaintiff not being the "payee" of the pro-note could not, by reason of s. 78 read with s. 8, Negotiable Instruments Act, successfully enforce the liability of the defendants under the pro-note. We have heard learned counsel for the parties at great length on this question. Our attention has been invited to a large number of rulings both of this Court as well as of other High Courts. The relevant provisions of the Negotiable Instruments Act are contained in ss. 8 and 78 of the Act. Section 8 defines the "holder" of a promissory note, bill of exchange or a cheque. It says:

"The holder of a promissory note, bill of exchange or cheque, means any person *entitled in his own name* to the possession thereof and to receive or recover the amount due thereon from the parties thereto."

Section 78 reads thus:

"Subject to the provisions of s. 82, Cl. (c), payment of the amount due on a promissory note, bill of exchange or cheque, must, in order to discharge the maker or acceptor, be made to the holder of the instrument."

[7] Reading the two sections together it is clear that the person to whom the payment should be made in order to discharge the maker or the acceptor from all liability under the instrument is the "holder" of the instrument or his accredited agent, such as a banker acting as an agent for collection. The "holder" of a promissory note is essentially the person who is



"entitled in his own name." The words "*entitled in his own name*" are obviously most significant. The legislature appears to have clearly intended to prevent any one from claiming the rights of a "holder" under the Act on the grounds that the ostensible holder is a mere name-lender. The term "*holder*", therefore, does not include a person who, though in possession of the instrument, has not the right to recover the amount due thereon from the parties thereto. The principle enshrined in S. 78 of the Act is clearly in accord with the basic principle underlying the law relating to negotiable instruments, viz., that the doctrine of *benami* will introduce an element of uncertainty greatly hampering the free circulation of negotiable instruments. The Negotiable Instruments Act has been enacted for encouraging trade and commerce and the underlying principle undoubtedly is that promissory notes, bills of exchange and cheques should be negotiated *as apparent on their face* without reference to the secret title to them. It is for this reason that the provisions of S. 78 provide that in order to discharge the maker or acceptor from liability payment must be made to the "payee" or the "holder" of the instrument. Section 48 of the Act provides for the negotiation of a promissory note by the holder by means of an endorsement and delivery. The effect of such endorsement and delivery is to transfer to the endorsee the property in the note with a right to negotiate it still further. It would appear, therefore, that the property, or ownership, in a promissory note including the right to recover the amount due thereon is vested by statute in the holder of the note. The express words of S. 78 no doubt do not negative a right of suit but the effect of allowing a suit by any one except the payee or the holder of the note would necessarily be to put the maker or the acceptor of the instrument in a most difficult situation. As has been said, a person so circumstanced is liable to be shot at twice : once by the person who is the "real" holder and then again by the person who is the "holder" within the meaning of the Negotiable Instruments Act.

[8] Under the general law, a principal can institute a suit to enforce a contract entered into by his agent though his name is not disclosed but S. 78, Negotiable Instruments Act, clearly implies that there is an exception to the general rule so far as negotiable instruments are concerned. There are numerous cases in the reports and quite a number of them have been brought to our notice in the course of arguments by the learned counsel in which S. 78 of the Act has been strictly construed, and it has been held that a valid discharge can be given to the maker or

acceptor of the instrument only by the payee of the note or the holder thereof. It has further been clearly laid down that there is no such thing for this purpose as a *benami* promissory note taken in the name of one person but really meant for the benefit of another. Reference might be made to the cases of [*Ghanshyam Das Marwari v. Ragho Sahu*] A. I. R. 1937 Pat. 100,<sup>1</sup> [*Reoti Lal v. Manna Kunwar*] 44 ALL. 290;<sup>2</sup> [*Dori Lal v. Sewak Ram*] 13 A. L. J. 695;<sup>3</sup> [*Har Kishore Barua v. Guru Mia Chowdhry*] A. I. R. 1931 Cal. 387 : 58 Cal. 752<sup>4</sup> and [*Raghubir Mahto v. Ramasray Bhagat*] A. I. R. 1939 Pat. 347.<sup>5</sup> The sum total of the principle enunciated in the cases referred to above comes to this. Where a hand-note is executed in favour of a *benamidar*, it is not open to the promisor to assert that the holder of the note is not the beneficial owner. Conversely, if a suit is to be based upon the hand-note it must be instituted by the holder whose name appears on the note and not by any person who alleges that the original holder is his *benamidar* and that he is the beneficial owner. Reference might also be made here to the case of [*Sadasuk Janki Das v. Sir Kishan Pershad*] 46 Cal. 663<sup>6</sup> and to the case of [*Subba Narayana Vathiyar v. Ramaswami Aiyar*] 30 Mad. 88.<sup>7</sup> It was observed by their Lordships of the Privy Council in the case of *Sadasukh Janki Das* that:

"It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand . . . . . It is not sufficient that the principal's name should be "in some way" disclosed, it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bills."

With reference to the contention based on Ss. 26, 27 and 28 of the Negotiable Instruments Act their Lordships observed :

"These sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal."

In the case of [*Subba Narayana Vathiyar v.*

1. ('37) 24 A. I. R. 1937 Pat 100 (101) : 16 Pat 74 : 167 I. C. 57 (FB).
2. ('22) 9 A.I.R. 1922 All. 70 (70) : 44 All. 290 : 65 I. C. 785.
3. ('15) 2 A. I. R. 1915 All. 261 (261) : 29 I. C. 988 : 13 A. L. J. 695.
4. ('31) 18 A. I. R. 1931 Cal. 387 (389) : 58 Cal. 752 : 131 I. C. 570.
5. ('39) 26 A. I. R. 1939 Pat. 347 (348) : 183 I. C. 60.
6. ('18) 5 A. I. R. 1918 P. C. 146 (147) : 46 Cal. 663 : 46 I. A. 33 : 50 I. C. 216 (P. C.).
7. ('07) 30 Mad. 88 (91) (FB).



Ramaswami Aiyar]<sup>7</sup> the Full Bench of the Madras High Court held that

"According to the law merchant which governed negotiable instruments in this country before the passing of the Negotiable Instruments Act, no person could sue on a negotiable instrument unless he were named therein as payee or unless he had become entitled as endorsee or bearer. Sections 8 and 78, Negotiable Instruments Act have reproduced the law as it stood before the passing of the Act. The general provisions of the Indian Contract Act as regards the rights and liabilities of undisclosed principals were not intended to alter these well established rules as to negotiable instruments. In a suit on a negotiable instrument by the payee named therein or the indorsee, it is not open to the defendant to plead that such payee or indorsee is a mere benamidar."

[9] As a corollary to the general rule above indicated, it has been held that the "real" creditor, as distinguished from the payee or the holder of the instrument, cannot be allowed to fall back upon the original consideration and to sue for the money advanced by him independently of the promissory note by proving the actual loan. On the contrary, obviously with a view to moderate the rigour of the general rule above indicated, it has been held in a number of cases that section 78 does not in reality deal with a right of suit and looking to the language of section 78 that is obviously correct. It has accordingly been held that the real owner is entitled to sue *provided* he is in a position to obtain a good discharge from liability from the maker or acceptor of the instrument. The fact that a person who is not the holder of the instrument cannot claim the privileges of a "holder," so it has been held, does not disentitle him from suing. Thus, in a suit brought by the "real" creditor to which the maker and the holder of the promissory note were parties a decree was passed against the maker with a proviso that payment shall be made to the real creditor only on his securing a valid discharge of the maker from the holder of the note: *vide* [Sewa Ram v. Hoti Lal] 53 ALL. 5.<sup>8</sup> The contention that the real creditor, the holder of the promissory note being his benamidar, is precluded from maintaining a suit for enforcement of the liability incurred by the maker under the pro-note was repelled. With the utmost respect to the two learned Judges, Sen and Niamatullah, JJ., who decided that case, we must say we find ourselves in full agreement with their views. Similarly, in [Surajman Prasad Misra v. Sadan and Misra] A. I. R. 1932 Pat. 346<sup>9</sup> it has been held by two learned Judges of the Patna High Court that :

"In a suit on a pro-note in which the holder though not a plaintiff is a party and the plaintiff the real owner is in a position to give to the drawer through the holder a discharge, the plaintiff can maintain the suit."

8. ('31) 18 A.I.R. 1931 All. 108: 53 All. 5: 130 I.C. 698.  
9. ('32) 19 A. I. R. 1932 Pat. 346 (348) : 11 Pat. 616 : 140 I. C. 572.

To the same effect is the decision of a learned single Judge of the Patna High Court in [Sarjug Singh v. Deosaran Singh] A.I.R. 1930 Pat. 313<sup>10</sup> where it was held that :

"Section 78 does not debar the real beneficiary under the promissory note from suing on the basis of the note if he can give a discharge to the maker of the promissory note. The object of S. 78 is to secure a valid discharge to the maker of the note. If the person who is ostensibly the holder of the promissory note is made a party to the suit and in his presence it is alleged that the plaintiff is the real beneficiary and that the ostensible holder was not the real holder of the instrument, and he can prove his allegation by evidence or by the admission of the ostensible holder of the instrument, there is no reason why such a suit should not be maintainable."

The same principle has been followed in the case of [Swaminatha Odayar v. Subbarama Aiyar] A.I.R. 1927 Mad. 219=50 Mad 548.<sup>11</sup> In this case plaintiff 1 sold some properties to the defendant and for part of the purchase money took from the defendant a promissory note in favour of his mother, plaintiff 2. Plaintiff 1 then instituted a suit for enforcing his lien on the property sold for the part of the purchase money represented by the promissory note. It was held that his lien under S. 55 (4)(b), T. P. Act, was lost, but as the holder of the promissory note (plaintiff 2) was willing that a simple money decree on the basis of the note be passed in favour of plaintiff 1 (the beneficiary) such a decree could be passed. Similarly, in [Brojo Lal Saha v. Budh Nath] A. I. R. 1928 Cal. 148 = 55 Cal. 551,<sup>12</sup> two learned Judges of the Calcutta High Court expressed the view, though by way of obiter—"Section 78 does not prohibit any person other than the holder to bring a suit, if that person is the true owner." They further observed that it would be a very good defence for the maker or acceptor of a promissory note to say that unless the plaintiff in the suit gets him a discharge from the holder of the instrument he is not bound to pay. It must, however, be mentioned here that in a later Calcutta case, A.I.R. 1931 Cal. 387=58 Cal. 752,<sup>13</sup> two other learned Judges of the Calcutta High Court dissented from the view expressed in 55 Cal. 551<sup>12</sup> aforementioned and held that the real owner cannot sue even though the holder of the note is impleaded as a defendant to the suit and is willing to give a good discharge. Again, in [Balanna v. Firm Khudai Nazar Khan] A. I. R. 1941 Nag. 207<sup>13</sup> Bose J. while agreeing with his own decision in the case of [Gulabgir v. Nathmal] A. I. R. 1932 Nag. 23

10. ('30) 17 A. I. R. 1930 Pat. 313 (314):123 I. C. 395.

11. ('27) 14 A.I.R. 1927 Mad. 219 (225): 50 Mad. 548 : 100 I. C. 10.

12. ('28) 15 A. I. R. 1928 Cal. 148 (151) : 55 Cal. 551 : 105 I. C. 549.

13. ('41) 28 A.I.R. 1941 Nag. 207 (208) : I.L.R. (1942) Nag. 588 : 197 I. C. 426.



=27 N. L. R. 327<sup>14</sup> that the doctrine of *benami* could not be applied to negotiable instruments held that the question whether the real owner could in the special circumstances institute a suit when he was in a position to give a good discharge was left open in that case. He expressed his clear preference for the *broader view* taken in the Patna and Allahabad cases. He went on to observe :

"Although the doctrine of *benami* does not apply as such to negotiable instruments, the decisions of the Privy Council upholding *benami* transactions cannot be altogether ignored. I see no reason why a *narrow view of the law which would defeat a just claim should be taken*. I do not think S. 78 deals with a right of suit, for as I have already pointed out, there are cases in which a person who is not the 'holder' can sue."

The learned Judge was quite clear that the real owner was entitled to sue provided he was in a position to obtain a good discharge for the defendant.

[10] As must have been noticed from the discussion and the decisions in the cases above referred to judicial opinion on the question whether a suit lies at the instance of the real holder as distinguished from the payee or the endorsee of a promissory note is far from unanimous. The broader view, however, which has been accepted in some of the cases referred to above, e.g., in the case in 53 ALL. 5,<sup>8</sup> the case in A. I. R. 1932 Pat. 346<sup>9</sup> and the case in A. I. R. 1941 Nag. 207<sup>13</sup> appeals to us as the one more in consonance with the dictates of justice and fairplay. It must, however, be carefully noted that in all these cases, with the exception of the Nagpur case, the "holder" of the note was himself a party to the suit. In the Nagpur case, however, the promissory notes in question were in favour of Khudai Dad Khan and not in favour of the firm of partnership that had instituted the suit. In that case Khudai Dad Khan does not appear to have been impleaded as a party but he had entered the witness box and was evidently agreeable to the decree being passed in favour of the plaintiff (the partnership.) Under those circumstances the decree in favour of the firm was maintained provided the firm obtained within one month from the date of the decision a proper discharge from Khudai Dad Khan exonerating the defendant from all liability to him under the pro-note.

[11] Reverting to the facts of the present case we find that the pro-note dated 25.8.1928 as also the pro-notes executed subsequently by the defendants were all in favour of Shri 108 Baba Kali Kamliwala Ramnath Maniramji of Rishikesh, that is to say, in favour of an individual person, namely, Ramnath Maniramji of Rishikesh. It is

true that in the pro-note dated 5-11-1934 Baba Ramnath Maniramji is described as "the owner and manager of the Kshetra Baba Kali Kamliwala" but that cannot be of any help to the plaintiff-respondent in this case. It is beyond dispute therefore that the original pro-note as well as the pro-notes executed subsequently were in favour of Ramnath Maniramji Maharaj. It may be that he was the owner and manager of what became a registered society as Baba Kali Kamliwal Panchaiti Kshetra, Rishikesh, in the year 1932—we are informed that the society was registered on 4-1-1932—but that fact, in our judgment, cannot make any real difference. The position, therefore, is that the suit has been instituted in the name of a registered body and the payee of the promissory note in question is not a party to the suit. During the course of the hearing of this appeal we were informed by the learned counsel that Ramnath Maniramji Maharaj was dead. Beyond this statement of the learned counsel for the respondent, however, there is no other indication in the record as to whether he is dead or alive and also, if he died, when he died and whether he left any heir and who that heir is. From the un rebutted evidence of Bishambhar Sahai, the *Karinda* of the plaintiff-respondent, it appears that the consideration of the pro-note in question may very possibly have come out of the funds of the Kshetra Baba Kali Kamliwala, the registered society, but in the present case we find it impossible to hold that the plaintiff (the registered society) was (while the suit was pending in the Court below) or is even now in a position to secure a discharge of the defendant from all liability under the pro-note in suit. We are, therefore, constrained to hold that the present case does not fall even within the scope of the "*broader principle*" referred to above. In this view of the matter, the contention of the learned counsel for the appellant must be accepted. It follows, therefore, that the suit as instituted by the plaintiff-respondent could not succeed. As the decision on this question is fatal to the claim of the plaintiff-respondent we do not discuss the other questions raised in the case.

[12] In the result, therefore, this appeal must be allowed, the decree of the Court below set aside and the suit filed by the plaintiff-respondent dismissed with costs throughout. The appeal is accordingly allowed with costs throughout.

N.S./D.H.

*Appeal allowed.*



**A. I. R. (34) 1947 Allahabad 57 [C. N. 29.]**

ALLSOP AND MALIK JJ.

*Mt. Khushal Kunwar — Decree-holder — Appellant v. Zauki Ram — Judgment-debtor — Respondent.*

First Appeal No. 259 of 1942, Decided on 8-11-1945, from order of Civil Judge, Shahjahanpur, D/-6-12-1941.

(a) U.P. Debt Redemption Act (13 [XIII] of 1940), S. 8—Order amending decree is appealable.

An order amending a decree under the provisions of S. 8, U. P. Debt Redemption Act, is appealable: ('46) 33 A.I.R. 1946 All. 89 (F.B.), *Foll.* [Para 1]

(b) Hindu law — Separation — Separate shares mentioned in *khewat*— This does not prove separation.

The fact that there are separate shares mentioned in the *khewat* does not prove that family has been disrupted or that property is no longer joint family property.

[Para 2]

(c) U. P. Debt Redemption Act (13 [XIII] of 1940), S. 3, cl. (d) —S. 3 (d) applies only to property which is not property of joint Hindu family.

Clause (d) of S. 3 applies only to property which is not property of a joint Hindu family and consequently once it is held that an applicant is a member of a joint Hindu family and that the property mortgaged was joint family property the applicant's status as an agriculturist cannot be based upon the terms of this provision.

[Para 3]

(d) U. P. Debt Redemption Act (13 [XIII] of 1940), Ss. 2 (3) and 3 (e) and 8—Decree against joint Hindu family on basis of mortgage executed by members to secure debt advanced to family—Family paying land revenue of Rs. 2400 — Application for amendment of decree filed by member must be deemed to be one on behalf of family and is not application of agriculturist.

Where the decree is clearly against the joint Hindu family as such on the basis of a mortgage executed by the members of the family in order to secure a debt advanced to the family, the Hindu joint family must be treated as an entity and it is only the joint family which can apply for the amendment of the decree.

[Para 4]

Where under such circumstances it is found as a fact that the family as a whole pays a land revenue of Rs. 2400 and that the local rate is one-tenth of the land revenue, the joint family taken as a whole is not an agriculturist within the meaning of S. 2, sub-s. (3) of the Act. An application by one of the members should, under such circumstances, be deemed to be one on behalf of the family and consequently is not the application of an agriculturist within the meaning of the Act.

[Paras 3, 4]

*L. N. Gupta*—for Appellant.

*G. S. Pathak*—for Respondent.

**Allsop J.**— The Court below amended a decree under the provisions of S. 8, United Provinces Debt Redemption Act, 1940. The decree-holder has appealed. There is a preliminary objection that no appeal lies, but this is concluded by the decision of a recent Full Bench of this Court in the case in [*Man Mohan Lal v. Raj Kumar*] Civil Revn. No. 91 of 1942.<sup>1</sup> We must consequently overrule the preliminary objection.

<sup>1</sup> Reported in ('46) 33 A. I. R. 1946 All. 89 (99) : 225 I.C. 200 (F.B.).

[2] On the merits, the question is whether the decree-holder, (judgment-debtor?) who sought the amendment of the decree, was an agriculturist within the meaning of the Act. The decree which was amended was on the basis of a mortgage of joint Hindu family property in order to secure an advance made to the family. The judgment-debtor who sought the amendment of the decree was Zauki Ram. At the time when the deed was executed his brother, Sia Ram, was alive. Their uncle, Hulas Rai, who has since died and his two sons, Bajrang Das and Ram Das, who are still alive executed the deed together with Sia Ram and Zauki Ram himself. Zauki Ram at the time when he sought to have the decree amended alleged that he had separated from Bajrang Das and Ram Das, but the learned Judge held that there was a presumption of jointness and that Zauki Ram had failed to prove that any separation had taken place. The learned Judge was undoubtedly right in placing the burden of separation upon Zauki Ram and he was also right in his conclusion that Zauki Ram had failed to discharge the burden. There are separate shares mentioned in the *khewat*, but it has always been held that this fact does not prove that family has been disrupted or that property is no longer joint family property. Zauki Ram admitted that all the members of the family filed a joint return for purposes of income-tax. He also admitted that some money-lending business was still joint. The learned Judge pointed out that there was no evidence of the payment of profits by one member of the family to the other although they were shown in the papers as being *lambar-dars* of different mahals. We are satisfied that the family was joint at the time when the decree was passed and is still joint.

[3] It has also been found as a fact that the family as a whole pays a land revenue of Rs. 2400 and that the local rate is one-tenth of the land revenue. If the joint family is to be taken as a whole it is obvious that it is not an agriculturist within the meaning of S. 2, sub-s. (3) of the Act. On the other hand, Zauki Ram's share of the land revenue is less than Rs. 1000 and upon this basis the learned Judge has held that he is an agriculturist and is entitled to get the decree amended. In our judgment, the learned Judge is in error upon this point. It is true, cl. (d) of S. 3 of the Act says that a joint proprietor or a joint tenant shall be deemed to be the proprietor or tenant of so much of the joint property or joint tenancy not being the property or tenancy, as the case may be, of a joint Hindu family, as appertains to his share, but it is to be noticed that this provision applies only to property which is not property of a joint Hindu family



and, consequently, once it is held that Zauki Ram is a member of a joint Hindu family and that the property mortgaged was joint family property Zauki Ram's status as an agriculturist cannot be based upon the terms of this provision. On the other hand, cl. (e) of the section says :

"Where the aggregate of the rent and ten times the local rate, if any, payable by a joint Hindu family— (i) does not exceed one thousand rupees, such family and every member of it shall be deemed to be an agriculturist ; (ii) exceeds one thousand rupees, a member of such family shall be deemed to be an agriculturist only if the aggregate of the rent and ten times the local rate payable in respect of his share and the shares of his male lineal ascendants and descendants in the joint family property does not exceed one thousand rupees."

[4] Zauki Ram may be deemed to be an agriculturist within the meaning of this clause, but at the same time the wording of the clause suggests that a joint Hindu family as such may be treated as an entity. If there had been a separate decree against Zauki Ram alone, he would have been entitled to say that he was an agriculturist and could have got that decree amended, but where the decree was clearly against the joint Hindu family as such on the basis a mortgage executed by the members of the family in order to secure a debt advanced to the family, we think that the Hindu joint family must be treated as an entity and that it is only the joint family which could apply for the amendment of the decree. There was no personal liability against Zauki Ram and no part of his property could be sold in order to satisfy the decree. In fact it is true that he is not the owner of any specific part of the property although for purposes of calculation under the Act he is to be treated to be a cosharer to the extent of the share which he would get if a partition took place at any particular time. If the joint family sought the amendment it was bound to fail because the joint family paid a revenue of Rs. 2400. In our opinion, it would be absurd that one member of the family could apply for the correction of the decree upon the ground that he personally was an agriculturist and secure the same result on behalf of the whole family which the family itself would be unable to secure. In our judgment Zauki Ram's application should be deemed to be one on behalf of the family, as undoubtedly it is, and consequently that it is not the application of an agriculturist within the meaning of the Act. The result is that we set aside the decree of the learned Judge of the Court below and direct that the original decree as framed before amendment shall stand. The appellant shall get his costs in both Courts.

D.S./D.H.

*Decree set aside.***A. I. R. (34) 1947 Allahabad 58 [C. N. 30.]****FULL BENCH****ALLSOP AG. C. J., VERMA AND MALIK JJ.***Bandhu Lal—Plaintiff—Appellant v. Bhagwan Das and others—Defendants—Respondents.*

First Appeal No. 166 of 1943, Decided on 25-4-1946, from order of Civil Judge, Mirzapur, D/- 6-1-1943.

**U. P. Agriculturists' Relief Act [27 (XXVII) of 1934], S. 2 (2)—Usufructuary mortgagee of fixed-rate tenancy—Mortgagee paying rent as such and not as mortgagor's agent—Mortgagee is agriculturist entitled to benefits of Act: 19 A. L. J. 702: (21) 8 A. I. R. 1921 All. 110: 63 I. C. 274, OVERRULED.**

In the case of a usufructuary mortgage of a fixed-rate tenancy, in the absence of a special contract, the mortgagee is bound to pay the rent and is entitled to claim the rights of the tenant as against the landlord while the mortgage subsists; and where he pays the rent in his own right as mortgagee and not merely as an agent of the mortgagor, he is an agriculturist within the meaning of the definition in the Act and can claim the benefits of the Act: 19 A. L. J. 702: (21) 8 A. I. R. 1921 All. 110: 63 I. C. 274, OVERRULED. [Para 1]

S. N. Seth—for Appellant.

N. P. Asthana, K. N. Sinha and J. N. Chatterjee—for Respondents.

**Allsop Ag. C. J.**—This appeal arises out of a suit for sale on the basis of a mortgage dated 17th December 1929. The property mortgaged consisted of houses. The mortgagees claimed the benefits of the Agriculturists' Relief Act and the question was whether they were agriculturists on the date of the execution of the mortgage. Their claim was based on the fact that they were on that date the usufructuary mortgagees from fixed rate tenants of certain plots in the fixed-rate tenancy. In so far it is relevant for the purposes of this appeal, the definition of an agriculturist in the U. P. Agriculturists' Relief Act, 1934, is a person who pays rent for agricultural land not exceeding Rs. 500 per annum. It is not disputed that the rent of the fixed-rate tenancy was less than Rs. 500 per annum. Learned counsel, however, has argued that a usufructuary mortgagee of a fixed rate tenancy is not himself a fixed rate tenant and that he does not pay rent on his own behalf but merely as an agent of the mortgagor. He has relied on the case of [*Saudagar Singh v. Ganga Singh*] 19 A. L. J. 702.<sup>1</sup> The learned Judges in that case argued, in the first place, that the mortgage of a tenancy does not extinguish it and, secondly, that a contract of mortgage between a mortgagor and a mortgagee cannot of itself create a contract with a third person and there is no contractual relationship between the mortgagee and the zamindar. With the greatest deference to the opinion of the learned Judges, I think that

1. (21) 8 A. I. R. 1921 All. 110 (111): 63 I. C. 274: 19 A. L. J. 702.



they overlooked the point that a fixed-rate tenancy is transferable under the law and that a fixed-rate tenant by an act of transfer can substitute another tenant in his place. Nobody would doubt that the landlord himself could by an act of transfer create a relationship of landlord and tenant between his transferee and his tenant. In the same way, where the tenancy is transferable, the tenant, by an act of transfer, can create such a relationship between the landlord and his transferee. It is true that a mortgage does not transfer the whole of the mortgagor's interest in the property mortgaged but such parts of the interest as are transferable vest for the time in the mortgagee. In the case of a usufructuary mortgage, in the absence of a special contract, the mortgagee is bound to pay the rent and is entitled to claim the rights of the tenant in possession as against the landlord while the mortgage subsists. In view of the definition in the Agriculturists' Relief Act, however, we are not really concerned with the question whether the mortgagee can properly be described as a fixed-rate tenant. He is undoubtedly the person who pays the rent for the holding. It is not denied in this case that the usufructuary mortgagees did in fact pay the rent and they certainly paid it in their own right as mortgagees and not merely as agents of the mortgagor. I have no doubt, therefore, that they were agriculturists within the meaning of the definition in the Agriculturists' Relief Act and that they were rightly allowed the benefits of that Act. The learned Judge of the Court below gave those benefits and the result is that the appeal should fail. I would dismiss it with costs.

**Verma J.**—I entirely agree and have nothing to add.

**Malik J.**—I agree.

**By the Court.**—We dismiss the appeal with costs.

V.R. *Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 59 [C. N. 31.]**

VERMA AND BIND BASNI PRASAD JJ.

*L. Baij Nath—Defendant—Appellant v. Mt. Ram Pyari—Plaintiff—Respondent.*

First Appeal No. 107 of 1945, Decided on 18th April 1946, from order of Civil Judge, Agra, D/-7-10-1944.

Civil P. C. (1908), O. 6, R. 17—Suit for pre-emption on ground that plaintiff was co-sharer and defendant was stranger—Amendment claiming relief on ground of relationship with vendor—Amendment held should not be allowed as it would change nature of case and would prejudice defendant.

In a suit for pre-emption, the plaintiff alleged that he was a co-sharer in the Mahal in which the property was situated and that the defendant vendee was an utter

stranger. The defendant alleged that he too was a co-sharer and that plaintiff was not entitled to preference over him. After issues were framed and before the date fixed for final hearing, the plaintiff applied for amendment of his plaint claiming relief on the ground that he was a 'near relation' of the vendor within the meaning of S. 12, Agra Pre-emption Act and that this ground had not been mentioned in the plaint through forgetfulness:

*Held* that the amendment, if allowed, would change the nature of the case, for the suit would then have been based on a totally new ground. Further, it was very likely that the allegation as to relationship was not true and that if the amendment had been allowed it would have enabled the plaintiff to adduce false evidence. The amendment could not therefore be allowed as the defendant would have been prejudiced thereby. [Para 2]

**C. P. C.**—

('44) Chitale, O. 6, R. 10, Note 10.

('41) Mulla, O. 6, R. 17, P. 595 Note 'Leave to amend ...case'.

*Gopal Behari*—for Appellant.

*S. B. L. Gour*—for Respondent.

**Verma J.**—This is a defendant's appeal from an order of remand. The suit was one for pre-emption. The trial Court dismissed it. The lower appellate Court has allowed the plaintiff's appeal and has remanded the suit.

[2] The sale deed in question was executed on 18-9-1942. The plaintiff instituted the suit on 14-9-1943. The allegation made in the plaint was that the plaintiff was a co-sharer in the Mahal in which the property was situated and that the defendant vendee was an utter stranger. The Court fixed 23-11-1943, for the framing of issues. The defendant filed his written statement on 23-11-1943, and alleged that he too was a co-sharer in the Mahal in question. The plea raised by the defendant thus was that the plaintiff was not entitled to preference over him. The Court framed issues on that date, and the first issue was whether the plaintiff had "a prior right of pre-emption against the defendant." The 14th January 1944 was fixed for final hearing. On 13-12-1943, the plaintiff filed an application alleging that she was a "near relation" and that she was entitled to pre-emption as against the defendant on that ground also. It was alleged in the application, that this ground was not mentioned in the plaint by mistake, or rather through forgetfulness (*sahwan*). The prayer was that the plaintiff be allowed to amend the plaint and to add a plea that the plaintiff was a "near relation" of the vendor within the meaning of those words in S. 12, Agra Pre-emption Act. The defendant filed a petition objecting to the amendment prayed for and, on 16-12-1943, the Court rejected the plaintiff's application for amendment, substantially on the ground that the plaintiff could not be allowed to change her case at that late stage. The case was taken up on the date fixed, viz. 14-1-1944. The plaintiff applied for adjournment



and the Court granted it, fixing 4th April for final hearing. The case came on for hearing on that date and, in view of the fact the copies of Khewats filed by the defendant established it beyond doubt that he too was a co-sharer in the Mahal, the Munsif dismissed the suit, as he was bound to do. The plaintiff took an appeal to the lower appellate Court and the learned Civil Judge, who heard the appeal, allowed it by a judgment which has to be characterised as unsatisfactory. The learned Judge expressed the opinion that the application for amendment would not change the nature of the case and that the vendee would not be prejudiced by the amendment being allowed. Both these grounds are clearly erroneous. The amendment, if allowed, would have changed the nature of the case, for the suit would then have been based on a totally new ground. Furthermore, from the facts stated above, it is clear that the plaintiff had come to Court with a false allegation, namely, that the defendant was a stranger. When the plaintiff found that the defendant had exposed the untruth of her allegation, she filed this application for amendment. There is every reason to suspect that this allegation of relationship is not true, for, it is difficult to believe that such an important allegation would not have been made in the plaint, as originally filed, if there had been any truth in it. Thus, if the amendment had been allowed, it would have enabled the plaintiff to adduce false evidence. In our judgment, the trial Court was perfectly right in holding that the plaintiff could not be permitted to harass the defendant in that manner. If the amendment had been allowed, the defendant would obviously have been prejudiced. The lower appellate Court was, in our opinion, wrong in allowing the plaintiff's application for amendment and sending the case back to the first Court.

[3] For the reasons given above, we allow this appeal and set aside the order of the lower appellate Court allowing the plaintiff's application for amendment as well as the order of remand. The case will go back to the lower appellate Court with the direction that it should reinstate the appeal filed in that Court at its original position in the register of pending appeal and will proceed to dispose of it after hearing arguments on the other points involved in the case. The appellant is entitled to his costs in this Court. The costs in the Court below will abide the event. A certificate will be issued to the appellant for refund of the court-fee paid on the memorandum of appeal filed in this Court.

K.S.

*Case remanded.***A. I. R. (34) 1947 Allahabad 60 [C. N. 32.]****MALIK AND WALIULLAH JJ.**

*Bhawani Shanker—Defendant—Appellant*  
*v. Ram Pal and others—Plaintiffs—Respondents.*

First Appeal No. 196 of 1944, Decided on 27-2-1946, from order of Civil Judge, Muttra, D/- 3-4-1944.

**U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), S. 33 (1)**—Section covers liabilities not coming strictly within definition of loan—Mortgage executed by agriculturist vendee in favour of creditor of vendor in respect of unpaid purchase price left with him by vendor for payment to creditor — Suit by vendee for accounts of money due under mortgage is maintainable under S. 33 (1) — Mortgage debt amounts to loan as defined by U. P. Debt Redemption Act—U. P. Debt Redemption Act (13 [XIII] of 1940), Ss. 2 (9), 8 and 9.

A, a debtor, sold certain properties to B an agriculturist and left a part of the purchase money in the hands of the vendee to pay off his creditor C. B paid the creditor in part and executed a mortgage in his favour for the rest of the debt. B brought a suit under S. 33, Agriculturists' Relief Act for accounts of money due to C and for declaration of the amount so due :

*Held* that the suit was maintainable as the wording of S. 33 (1) was wide enough to include liabilities which may not come strictly under the definition of the word 'loan' in the Debt Redemption Act or the Agriculturists' Relief Act. [Para 4]

*Held further* that the transaction was a 'loan' and that the mortgage debt amounted in substance to an advance as defined in the U. P. Debt Redemption Act so as to entitle B to the benefit of the provisions of Ss. 8 and 9, U. P. Debt Redemption Act : ('39) 26 A. I. R. 1939 All. 398, *Disting.* [Para 8]

V. D. Bhargava — for Appellant.

G. P. Bhargava — for Respondents.

**Malik J.**—This is a defendant's appeal. The plaintiffs filed a suit under s. 33, U. P. Agriculturists' Relief Act of 1934 for accounts of money due to the defendant from the plaintiffs and for a declaration of the amounts so due. The transactions which ultimately resulted in a mortgage dated 26th June 1925, executed by the plaintiffs in favour of the defendant and which was subsequently renewed by another mortgage dated 19th June 1931, between the same parties have been fully set out in the judgments of the Courts below.

[2] The learned Munsif held that the mortgages of 1925 and 1931 did not refer to transactions which could be called loans within the meaning of that expression in the Debt Redemption Act (XIII [13] of 1940). The reason given by him was that at no stage the defendant advanced any money to the plaintiffs.

[3] On appeal the lower appellate Court held that in view of the fact that the liability of payment of the consideration under the sale deed had subsequently been changed into the liability as mortgagors under the mortgage deeds dated 26th June 1925 and 19th June 1931



the transactions as evidenced by the latter two documents do in fact amount to loans. He, however, remanded the case to the trial Court with directions that the case might be disposed of according to law after taking accounts between the parties.

[4] So far as the remand order is concerned, no objection can be taken to it as the plaintiffs would, in any case, be entitled to a decree for accounts and for a declaration under S. 33, Agriculturists' Relief Act, whether the debts due from them were loans as defined under the Debt Redemption Act or the Agriculturists' Relief Act or were not. The lower Court has observed as follows :

"The crucial point for consideration in this appeal is as to whether or not the transaction under the mortgage deed dated 26th June 1925, does or does not amount to a loan because if it does not, the suit would not be maintainable under S. 33, Agriculturists' Relief Act."

The view of the learned Judge that if the transaction did not amount to a "loan" the suit for accounts and for a declaration of the amounts due would not be maintainable under S. 33 of the Act, does not seem to be correct as a reference to the first sub-section would show that the word 'loan' is not mentioned in it at all. An agriculturist debtor is entitled under sub-s. (1) of S. 33 to

"sue for an account of money lent or advanced to, or paid for him by any person, or due by him to any person as the price of goods or on a written or unwritten engagement for the payment of money, and of money paid by him to such person."

It would be clear that the words of the sub-s. are wide enough to include liabilities which may not come strictly under the definition of the word 'loan' in the Debt Redemption Act or the Agriculturists' Relief Act.

[5] The only relevancy of the determination of the question whether the amounts due are 'loans' as defined in the Debt Redemption Act or the Agriculturists' Relief Act is that in calculating the rate of interest if the amounts are loans as defined in the Debt Redemption Act, ss. 8 and 9 of that Act would apply. If, on the other hand, they are loans as defined in the Agriculturists' Relief Act and not under the Debt Redemption Act, the relevant sections of the Agriculturists' Relief Act would be applicable. If the amounts are not loans under either of the two Acts, then the plaintiffs would be entitled to the benefit of only the Usurious Loans Act.

[6] Learned counsel for the appellant has urged that the expression of the opinion of the learned Civil Judge that the amount due under the mortgage dated 26-6-1925, was a loan under the Debt Redemption Act would prejudice him as the trial Court would calculate the interest in accordance with the provisions of the Debt

Redemption Act. He has urged that we should hold in his favour that the amounts due under the mortgages of 1925 and 1931 are not loans as defined under the Debt Redemption Act. We do not, however, see how we can do that. The defendant's father had advanced two sums of money to Brij Behari Lal in the years 1918 and 1919 with the result that Brij Behari Lal was the debtor and Roshan Lal, father of the defendant, was the creditor. Brij Behari Lal died and his sons sold certain properties to the plaintiffs and left some money in their hands to pay off the debts due to Roshan Lal. The plaintiffs instead of paying up Roshan Lal paid him in part and for the rest executed a mortgage in his favour on 26-6-1925. From these facts, it is clear that the defendant, who is the son of Roshan Lal, Roshan Lal having died, agreed to change his debtor and treat the plaintiffs as his debtors in place of Brij Behari Lal, the original debtor.

[7] Learned counsel has further argued that as the sum of Rs. 5200 for which the mortgage was executed, either wholly or in part at some time represented the unpaid purchase money, it can, in no case, ever amount to a loan. With that proposition we are not prepared to agree.

[8] Learned counsel has referred us to the decision of a learned Single Judge of this Court in [Mohd. Shibli Khan v. Ish Datt Dikshit] A. I. R. 1939 ALL. 398.<sup>1</sup> In that case the mortgage transaction was between the vendor and the vendee. Without expressing any opinion as to the correctness of that decision, all that we need say is that the facts of that case are entirely different. In the case before us, the mortgage deed was executed by the plaintiffs who had purchased some property in favour of not their vendor but in favour of an entirely third party, a creditor of the vendor. We do not see how we can hold that this is not a transaction which is a loan and that the mortgage debt does not in substance amount to an advance as defined in the U. P. Debt Redemption Act. There is no force in this appeal and we dismiss it with costs.

K.S.

*Appeal dismissed.*

1. ('39) 26 A. I. R. 1939 All. 398 (398).

**A. I. R. (34) 1947 Allahabad 61 [C. N. 33.]**  
SINHA J.

*Brij Mohan Lal—Applicant v. Emperor.*

Cri. Revn. No. 366 of 1946, Decided on 28-6-1946, against order of Sessions Judge, Agra.

Penal Code (1860), S. 441—Intention to intimidate, insult or annoy — Intention is the *sine qua non* of offence under S. 441 — No offence is committed if intimidation or annoyance is only the result of act and is not intended.

Intention is the *sine qua non* of the offence under S. 441, Penal Code. Annoyance or intimidations might



result from a certain conduct and yet it may never have been intended. It is also possible to conceive of a case where, although intended, there is no annoyance or intimidation. Intention is, therefore, the pivot and not the result. [Para. 8]

Where, therefore, the accused was found to have entered the house of another at night at the invitation of a female servant and there was no intention to commit theft or to intimidate, insult or annoy any person, it was held that no offence was committed under S. 441, Penal Code: ('16) 3 A.I.R. 1916 All. 152, *Foll.* [Para. 8]

*B. S. Darbari* — for Applicant.

*Deputy Government Advocate* — for the Crown.

**Order.** — This is an application in revision against an order of the learned Sessions Judge of Agra by which he substantially affirmed the judgment of a learned Magistrate of the First Class.

[2] The applicant is a constable attached to the police force at Agra. He was found inside the compound of the house of Mr. Hardial Singh, prosecuting Inspector, on the night of 22-5-1945, at about 11 P. M. Mrs. Hardial Singh was lying on a *charpoy* in the court-yard. She saw the accused standing near her bed. She got up and asked him "who is there?" She recognized the applicant and reprimanded him. The applicant scaled a wall and walked away. Mrs. Hardial directed her daughter to inform her husband. Mr. Hardial was roused by one Islam Ahmad, the son of a police head constable. The boy told him that a constable had gone to Mrs. Hardial Singh's bed, lifted the curtain leading to the women's quarter and had then walked away. Hardial and Islam then saw the accused passing by a *neem* tree near a latrine, and going towards the police outpost. Hardial shouted, but the accused made no response. He went to the police outpost and told the Sub-Inspector about the occurrence. The applicant was arrested and was taken to Mrs. Hardial and she identified him as the intruder. The above, in brief, is the story for the prosecution.

[3] The defence, in the main, was that the applicant had an attack of sunstroke which had caused mental aberration and the act attributed to him was a result of that. The learned Magistrate accepted the story for the prosecution in the main, and held that the applicant was guilty. He sentenced him to rigorous imprisonment for one year under S. 457, Penal Code.

[4] The learned Sessions Judge, on appeal, agreed with the finding of the learned Magistrate, but thought that having regard to the antecedents of the accused, the case fell within the purview of S. 454, Penal Code, and, therefore, altered the conviction under S. 457 to one under S. 454, Penal Code, and, in view of the fact that it was his first conviction, he directed his release under S. 4, First Offenders' Probation Act. He ordered the execution of a bond for

Rs. 300 with two sureties in Rs. 300 each. In the event of a breach or failure to produce them, he was directed to undergo rigorous imprisonment for nine months. The accused has come to this Court in revision.

[5] The learned counsel contends that, on the findings of the learned Judge, the applicant is entitled to acquittal. He takes his stand on the following observations:

"I do not think, however, that it can be said that the appellant had gone to commit theft. There is nothing to show that he had gone there for that purpose and the evidence is that he had walked away at a normal pace from the house. It might be that he had gone to meet a female servant or for some other purpose not connected with theft."

[6] If the accused had gone to the house "to meet a female servant," I do not think the case comes within the mischief of S. 454, Penal Code. Section 454 says:

"Whoever commits lurking house trespass or house-breaking, in order to the committing of any offence punishable with imprisonment."

The important words are: "In order to the committing of any offence."

[7] Theft being ruled out of consideration, the only other alternative is that he had gone "to meet a female servant." In other words, he had gone at the invitation of an inmate of the house, though not a member of the family.

[8] The next question is: What offence, if any, has the applicant committed, if he went to the house under these circumstances? Section 441, Penal Code, furnishes an answer to this question and says:

"Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. . ."

"Intention" is the *sine qua non*. Annoyance or intimidation might result from a certain conduct and yet it may never have been intended. It is also possible to conceive of a case where, although intended, there is no annoyance or intimidation. "Intention" is, therefore, the pivot and not the result. The view which I have taken is supported by 1916 A. L. J. 719.<sup>1</sup>

[9] "In this view it is not necessary to consider the precise defence taken 'that the accused was suffering from mental aberration,' although, I feel constrained to say it was not absolutely devoid of merit. The result is that I allow this application and set aside the conviction and sentence.

D.R.

*Revision allowed.*

1. ('16) 1916 A.L.J. 719; ('16) 3 A.I.R. 1916 All. 152 : 38 All. 517 : 35 I. C. 979, *Emperor v. Gaya Bhar.*



**A. I. R. (34) 1947 Allahabad 63 [C. N. 34.]****FULL BENCH****BRAUND, HAMILTON AND PATHAK JJ.***Sri Thakur Dwarkadhishiji Maharaj—Decree-holder—Appellant v. Bipti and others—Judgment-debtors—Respondents.*

Exn. Second Appeals Nos. 493, 494 and 1826 of 1943, Decided on 3-4-1946, from order of Dist. Judge, Agra, D/- 28-10-1942.

(a) U. P. Stayed Arrears of Rent (Remission) Act (18 [XVIII] of 1939), S. 3—Scope—Application for recovery of arrears of rent—Decree for arrears of rent—Execution application to enforce decree—Application is application for recovery of arrears of rent—U. P. Stay of Proceedings (Revenue Courts) Act (4 [IV] of 1937), S. 2.

An application for the execution of a decree, itself obtained in respect of arrears of rent, is in substance an application which has as its object to obtain the money which has been ordered by the decree to be paid, that is to say, the money which represents the arrears of rent originally sued for. The words "recover" and "recovery" are wide enough and are appropriate to cover a case in which a man seeks to obtain for himself the fruits of a decree and in that way to get the arrears of rent which that decree represents. It is not a very long, nor indeed incorrect, step to treat the execution of a decree as a step in the suit itself. There is, therefore, no necessity to apply any particular force to the actual words of S. 3 in order to include within the category of "applications for the recovery of arrears of rent" that process which is the execution of a decree by which a successful plaintiff hopes to reduce to the form of cash the decree which is the fruit of his suit. In plain language, it is a means of "recovering" that which he originally sued for. [Para. 9]

To argue that the debt, having merged in the judgment, there remains no longer any "arrears of rent" to be recovered is to force a technicality too far. It is quite true that for many purposes a debt does merge in a judgment or in a decree and in that sense disappears, but it is by no means for all purposes that this happens. (1894) 1 Q. B. 189, *Ref.* [Para. 10]

Therefore, on the true construction of S. 3, U. P. Stayed Arrears of Rent (Remission) Act, read with S. 2, U. P. Stay of Proceedings (Revenue Courts) Act, 1937, and S. 2, U. P. Stay of Proceedings (Revenue Courts) (Amendment) Act, 1937, an application made in execution to enforce a decree obtained in respect of arrears of rent is an "application for the recovery of arrears of rent which, if made during the period in which U. P. Stay of Proceedings (Revenue Courts) Act, 1937, is in force, would have been stayed under the provisions of that Act." (41) 28 A.I.R. 1941 Oudh 273 (F.B.), *Ref.* [Paras. 2 and 12]

(b) U. P. Stayed Arrears of Rent (Remission) Act (18 [XVIII] of 1939), Preamble—Object of Act was to grant concessions to tenants in matter of arrears of rent.

It is obvious from the Preamble of the Act that the main object of the Act was to grant concessions to tenants in the matter of the arrears of rent due from them to their landlords. [Para. 5]

(c) U. P. Stayed Arrears of Rent (Remission) Act (18 [XVIII] of 1939), S. 5—Mere current annual rent, apart from arrears of rent, is to be treated as test whether person comes within S. 3. (Per Division Bench).

In the context the more natural meaning of the word "rent" is that it refers merely to current rent. The words "payable in" are more apt to describe the

liability which arises in respect of a particular year than a liability which arose in some earlier year and was merely by accident protracted into the year 1344 Fasli. Further, rent in abstract is one thing. "The" rent payable in the particular year is another thing altogether. The introduction of the word "the" indicates that the Legislature is referring to some particular rent and that rent can only be the rent payable in a particular year in the sense that it accrues due in respect of that year. Hence, it is merely the current annual rent which is to be treated as the test whether the person comes within S. 3 or not and not what in fact was payable in the particular Fasli year 1344, whether it was current rent or whether it was arrears of rent. [Paras. 19, 22, 23 and 24]

(d) U. P. Stayed Arrears of Rent (Remission) Act (18 [XVIII] of 1939), S. 3—Scope—Application for recovery of arrears of rent—Decree for arrears of rent—Decree executed by obtaining order for ejectment—Execution application involving merely application for ejectment—Still execution application is application for recovery of arrears of rent. (Per Division Bench).

An application for execution of a decree for arrears of rent, whatever form it takes, arises out of the decree for rent and is an application the object of which is to recover that rent. In short, it says to the judgment-debtor that if he does not pay it, he would be ejected, and the actual ejectment is merely the logical sequence of his refusing to pay. Therefore, an application for execution which involves merely an application for ejectment, the decree having been executed by obtaining an order for ejectment, is nonetheless an application for the recovery of arrears of rent. [Para. 25]

*Govind Das*—for Appellant.

*Jagdish Swarup*—for Respondents.

**Opinion of the Full Bench.**

**Braund J.**—(29-1-46.) We have before us as a Full Bench a question of law arising out of three second Appeals, Nos. 493, 494 and 1826, all of 1943. In each of these cases the facts are for the present purpose identical. It need only be said that in each case the plaintiff, who was a landlord, obtained a decree for arrears of rent against his tenant. That decree he sought to execute by the usual execution proceedings, and in each of the three cases he has been confronted with S. 3, U. P. Stayed Arrears of Rent (Remission) Act, 1939 (Act 18 [XVIII] of 1939), out of which this reference arises.

[2] The actual terms of reference are these:

"Whether, upon the true construction of S. 3, U. P. Stayed Arrears of Rent (Remission) Act, 1939, (Act 18 [XVIII] of 1939), read with S. 2, U. P. Stay of Proceedings (Revenue Courts) Act, 1937 (Act 4 [IV] of 1937) and S. 2, U. P. Stay of Proceedings (Revenue Courts) (Amendment) Act, 1937, an application made in execution to enforce a decree obtained in respect of arrears of rent is an application for the recovery of arrears of rent which, if made during the period in which the U. P. Stay of Proceedings (Revenue Courts) Act, 1937, is in force, would have been stayed under the provisions of that Act."

[3] The point is a very short one, being in effect merely whether the words "applications for the recovery of arrears of rent" are wide enough to include applications to execute decrees which have already been obtained in a suit claiming arrears of rent.



[4] Section 3, U. P. Stayed Arrears of Rent (Remission) Act, 1939, appears in an Act the preamble of which is as follows:

"Whereas it is expedient to remit arrears of rent the proceedings for the recovery of which have been stayed by the U. P. Stay of Proceedings (Revenue Courts) Act, 1937. . . . ."

[5] It appears obvious that the main object of this Act was to grant concessions to tenants in the matter of the arrears of rent due from them to their landlords. Although this is not a consideration that can control the actual language which the Act has used, it has nonetheless to be borne in mind in giving a construction to S. 3. Recently Lord Atkin in the Privy Council in construing certain sections of our Agriculturists' Relief Act was constrained to say that:

" . . . . the words of a remedial statute must be construed, so far as they reasonably admit, so as to secure that the relief contemplated by the statute shall not be denied to the class intended to be relieved . . . . " : 1944 A. L. J. 162.<sup>1</sup>

[6] Section 3, United Provinces Stayed Arrears of Rent (Remission) Act, 1939, (which for convenience I shall hereinafter call "the Remission Act") follows an earlier Act of 1937 called the United Provinces Stay of Proceedings (Revenue Courts) Act, and it has to be considered, I think, in sequence to that Act. The 1937 Act by S. 2 provided that:

" . . . . all proceedings in suits and applications of the classes specified in the schedule to this Act . . . shall be stayed . . . . "

[7] It has to be observed that what were stayed by the 1937 Act were not proceedings for the recovery of arrears of rent, but certain definite classes of proceedings specified in the schedule to the Act which itself refers to the schedules of the Agra Tenancy Act, 1926. When those schedules are examined, it is found that the specified proceedings stayed by the 1937 Act can be classified into five categories. The first of those categories concerned the recovery of arrears of rent; the second related to ejectment; the third to the assessment and recovery of arrears of revenue; the fourth to the fixing of rent; and the fifth to the execution of money decrees.

[8] The relevance of it is this. When the United Provinces Stay of Proceedings (Revenue Courts) Act came to an end, S. 3, Remission Act, was enacted presumably for the purpose of being substituted for it. The appellants in these cases have rightly pointed out that, when the Remission Act came to be enacted, the framers of it chose by S. 3 to limit its mischief by carefully chosen words, namely, by saying that it is to apply to "all suits or applications for the recovery of arrears of rent . . . ."

The argument goes on to point out that since there were many other specified types of proceedings affected by the 1937 Act, it is only what can be strictly brought within the description of "suits or applications for the recovery of arrears of rent" that can be held to be still affected by S. 3, Remission Act. Put shortly, the argument is one of contrast between the breadth of the 1937 Act and what is said to have been the deliberate exclusiveness of the language of S. 3, Remission Act.

[9] This argument is certainly attractive. Nevertheless it does not, in my view, relieve us of the necessity of putting our own construction on the words of S. 3, which are the words we have to deal with. There were among those classes of proceedings which were affected by the 1937 Act that class which related to applications for the execution of decrees for arrears of rent, namely the types of application included in Group F-3 (a), 4 (2) and 4 (3) (a) of Sch. 4 to the Agra Tenancy Act. It is clear from this that the earlier Act of 1937 contemplated a stay of that type of application, which is precisely the type of application we have before us. It is possibly true that in strictness it can be said that an application to enforce a decree by execution is not itself an "application for the recovery of arrears of rent"; and again we are reminded that it is those words and none other that we have to consider in S. 3, Remission Act. Bearing that in mind, nevertheless, it cannot be denied that an application for the execution of a decree, itself obtained in respect of arrears of rent, is in substance an application which has as its object to obtain the money which has been ordered by the decree to be paid, that is to say, the money which represents the arrears of rent originally sued for. The words "recover" and "recovery" are to my mind wide enough, and are appropriate, to cover a case in which a man seeks to obtain for himself the fruits of a decree and in that way to get the arrears of rent which that decree represents. It is not a very long, nor indeed incorrect, step to treat the execution of a decree as a step in the suit itself. I, therefore, see no necessity to apply any particular force to the actual words of S. 3 in order to include within the category of "applications for the recovery of arrears of rent" that process which is the execution of a decree by which a successful plaintiff hopes to reduce to the form of cash the decree which is the fruit of his suit. In plain language it is a means of "recovering" that which he originally sued for.

[10] The strictly technical argument is, of course, that, the debt having merged in the judgment, there remain no longer any "arrears of rent" to be recovered. To my mind that is

1. (44) 1944 A. L. J. 162 : 31 A. I. R. 1944 P. C. 35: 19 Luck. 309 : I.L.R. (1944) Kar. P. C. 199 : 71 I. A. 56 : 213 I. C. 342 (P. C.), Raghubraj Singh v. Hari Kishen Das.



forcing a technicality too far. It is quite true that for many purposes a debt does merge in a judgment or in a decree and in that sense disappears. But it is by no means for all purposes that this happens, and one instance taken at random can be found in such a case as in (1894) 1 Q. B. 189<sup>2</sup> in which it was held for the purpose of the Bankruptcy Acts, in England that a creditor could still rely on his debt to found a bankruptcy petition, notwithstanding that he had already obtained a judgment on it.

[11] Bearing in mind, therefore, that we are construing an Act of a remedial character and having regard to the view of the construction of S. 3 that the words can naturally enough bear a meaning which will permit them to include an application to execute a decree obtained in respect of arrears of rent, I do not feel that we can exclude from that class of application which is prohibited by S. 3 an application by which a man in the position of the plaintiff in each of these suits seeks, by plucking the fruits of his suit, in substance and in fact to "recover" the money (that is to say, the arrears of rent) which constituted the sole cause of action on which that suit was originally brought.

[12] I am glad to find that this has been the view which has been accepted by two learned single Judges of this Court and is also the view which seems to have been favoured by the Oudh Chief Court in a Full Bench judgment in the year 1941 : A. I. R. 1941 Oudh 273.<sup>3</sup> For these reasons, in my judgment, this reference falls to be answered by saying that, on the true construction of S. 3, U. P. Stayed Arrears of Rent (Remission) Act, 1939, an application made in execution to enforce a decree obtained in respect of arrears of rent is an "application for the recovery of arrears of rent which, if made during the period in which the United Provinces Stay of Proceedings (Revenue Courts) Act, 1937, was in force, would have been stayed under the provisions of that Act."

[13] **Hamilton J.**—I agree with the view of my learned brother and have nothing to add.

[14] **Pathak J.**—I also agree with the view of my learned brother.

[15] **By the Court.**—The three Second Appeals in question will be sent back to the Courts whence they came now to be heard in accordance with the declaration we have made above. The costs of this Full Bench (if any) will be costs in the respective Second Appeals.

[16] As regards the two other revisions which have been before us to-day, Nos. 3 of 1942 and 63 of 1943, we understand that the applicant is

now dead. It may be that as a result of the decision of this Full Bench no one may desire to press them any further. We, however, direct that they now be remitted, with copies of this judgment attached, to the original Judges or Benches which were dealing with them.

#### JUDGMENT OF THE DIVISION BENCH

[17] **Braund J.** (*D/- 3rd April 1946*)—These three Second Appeals Nos. 493, 494 and 1826, all of 1943, have now come back to us after having been dealt with by the Full Bench in January. The effect of that Full Bench has been to dispose of the principal point which was common to all three second appeals. Another secondary point has been dealt with in another Full Bench and we are not now concerned with it. There only remain two small questions outstanding.

[18] The first of these affects only the second Appeals Nos. 493 and 494; but it is nevertheless an extremely neat point, the answer to which is not at first sight altogether apparent. What is said by Mr. Govind Das is that, if one looks at S. 5, U. P. Stayed Arrears of Rent (Remission) Act, 1939, one observes a very curious thing. Section 5 is a section which takes certain classes of persons out of the mischief of the Act. It says that :

"The provisions of S. 3 in this Act shall not apply to a suit or application instituted or made against any person *the rent payable by whom in the year 1344 Fasli was more than Rs. 500. . . .*"

[19] The words in italics above are relied on by Mr. Govind Das to suggest that it is not merely the current annual rent which is to be treated as the test whether the person comes within S. 3 or not, but it is what in fact was payable in the particular Fasli year 1344, whether it was current rent or whether it was arrears of rent. You have, he says, to take what was due in that particular year and, no matter how it was made up, if it exceeded Rs. 500, then it sufficed to take the case out of S. 3.

[20] This point is an ingenious one which relies on two words, namely the word "payable" and the word "in." It has been pointed out, not without force, that in the U. P. Stay of Proceedings (Revenue Courts) Act, 1937, which may be described as the parent Act, the expression "rent for" a period frequently recurs. In S. 5 of the Act with which we are dealing the expression has been changed to "rent . . . . in." That is one point. And Mr. Govind Das adds the second point that not only has the Legislature denoted that what is intended is not merely rent "for" a period but is rent "in" a period, but it has also introduced the word "payable," meaning thereby that what you have to look for is what amount of money the tenant was liable to pay in that particular period.

2.-(1894) 1 Q. B. 189, In re King and Beasley.

3. (41) 28 A. I. R. 1941 Oudh 273 : 16 Luck. 443 : 194 I. C. 387 (F. B.), Hari Saran Das v. Dhani Ram.



[21] This, as I have said, is ingenious and is not, in my opinion, altogether easy to answer. But on the whole I have come to the conclusion that it is more ingenious than sound. We have to construe the Act as we find it, and if it were clear on the face of S. 5 that those tenants who in the year 1344 owed more than five hundred rupees, whether for arrears or current rent, should escape the provisions of S. 3, then we should have to construe the Act in that way. But, in my opinion, there are indications that that is not really what has been expressed by the Legislature in the language it has used.

[22] Referring first to S. 3 itself, it is to be noticed that what it deals with is suits or applications for the recovery of arrears of rent. The whole section is dealing, not with current rent, but with arrears of rent and suits or applications to recover those arrears. When, therefore, in S. 5 it refers to a suit or application instituted or made against any person, it means a suit or application instituted in respect of arrears of rent. If that is so, it seems to me a little remarkable that the draftsman should have gone on immediately to use the word "rent" if he had not perfectly well understood that arrears of rent was one thing and rent was another thing. What Mr. Govind Das's argument amounts to is that the word "rent" in S. 5 means not only current rent but also arrears of rent. In my view, in the context the more natural meaning of the word "rent" is that it refers merely to current rent.

[23] But there is, I think, another indication. The words used are "the rent payable.... in the year...." The word "payable", I think, means that "which the tenant was liable to pay in the year". Now, it is not true to say that a tenant was liable to pay arrears of rent accrued in 1342 and 1343 in the year 1344. His primary liability was to pay that rent when it accrued due and that liability has been protracted into 1344 merely because he did not happen to pay it earlier. I think, therefore, that the words "payable in" are more apt to describe the liability which arises in respect of a particular year than a liability which arose in some earlier year and was merely by accident protracted into the year 1344.

[24] But there is another indication still, I think, in the word "the." Rent in the abstract is one thing. "The" rent payable in the particular year is another thing altogether. The introduction of the word "the" to my mind indicates that the Legislature is referring to some particular rent. And that rent can only be the rent payable in a particular year in the sense that it accrues due in respect of that year. For these reasons, in my opinion, the appeals fail on this point.

[25] There is only one other short point which

arises out of Second Appeal No. 1826 of 1943. It appears in this case that a decree had been obtained for the arrears of rent. That decree had been executed by obtaining from the execution Court an order for ejectment and I think that the execution Court had no more to do with the matter except possibly to see that its officer obtained and gave possession to the decree-holder. It is said, therefore, that because this execution application involved merely an application for ejectment, that is to say, to get the property back, it ceased to be (or possibly never was) an "application... for the recovery of arrears of rent." In my view there is nothing in this point. The execution application, whatever form it took, arose out of the decree for rent and was an application the object of which was to recover that rent. In short, it said to the judgment-debtor that if he did not pay it, he would be ejected. And the actual ejectment was merely the logical sequence of his refusing to pay. The application, therefore, was in my opinion nonetheless an application for arrears of rent because in the events which happened it turned out that the only course open to the judgment-debtor was in the end to retake possession. For these reasons, I think, that these three second appeals must be dismissed with costs.

[26] **Hamilton J.**—I agree with the decision arrived at by my learned brother and have little to add. I would point out that by S. 5 the provisions of S. 3 of this Act shall not apply also to any person who in the year 1937 was assessed to income-tax under the Income-tax Act, 1922, or under the income-tax law of any Indian State or to any person whose land was assessed in the year 1344 Fasli to a local rate of more than twenty-five rupees. A person who pays local rate of more than twenty-five rupees is a person who pays a certain amount of land revenue. These two provisions indicate that the object of the Legislature was to take into consideration the financial status of the individual in the year 1344, that status being arrived at by considering what his revenue was or what his income liable to income-tax was. In many of these local Acts, persons have been classified similarly taking into consideration the revenue and the income-tax and also taking into consideration the rent payable when land revenue was not payable. When two classes of persons out of three are arrived at by considering the financial status in a particular year, it seems to me reasonable to give a similar meaning to the expression which has been dealt with by my learned brother as regards the rent so as to make the same principle apply throughout, that is to say, the rent qualification would be *ejusdem generis* as the land revenue or income-tax as-



assessment qualification. As regards the point involved in Second Appeal No. 1826, the object was that in certain cases the rent that was payable to the zamindar was no longer made payable. If the tenant did not have to pay that rent, it seems to me that it would be anomalous to say that nevertheless he could be ejected for failing to pay a rent which in fact was not payable. I, therefore, agree with the decision arrived at by my learned brother.

**Order of the Court.** — The three appeals are dismissed with costs.

V.R.

*Appeals dismissed.*

**A. I. R. (34) 1947 Allahabad 67 [C. N. 35.]**  
SINHA J.

*Gokaran Singh—Appellant v. Emperor.*

Criminal Appeal No. 600 of 1945, De'd on 13-8-1946, from order of Sessions Judge, Mainpuri, D/- 13-8-1945.

(a) Criminal P. C. (1898), S. 367—Evidence of witnesses whose relations with accused are strained—Such evidence must be received with great caution, but need not be rejected on that ground alone.

It cannot be laid down as a dictum of universal application that in no case a conviction should be based on the testimony of witnesses between whom and the accused the relations are strained. It is possible to conceive of a case where the only witnesses are people between whom and the accused no love is lost. It will be a ground for severe scrutiny of that evidence or even for receiving it with great caution but it will not be a valid ground to reject it on that ground alone: 26 A.I.R. 1939 Pat. 292, *Ref.* [Para. 5]

('46 Com.)—Cr. P. C.—S. 367, N. 6.

(b) Penal Code (1860), S. 304—Sentence—Accused caught red-handed in act of stealing and obstructed by A and B—Accused hitting B with spear—B dying of injury—Intention not to cause death but only to facilitate theft—Sentence of 5 years under second part of S. 304 reduced to 2 years.

Where the accused were caught red-handed in the act of stealing and on taking to their heels they were chased and obstructed by A and B, whereupon accused hit B with a spear, of which injury B died subsequently:

*Held*, the intention of accused in hitting B was not to kill him or even to injure him seriously but to facilitate theft and hence the sentence of two years in place of 5 years under the second part of S. 304, Penal Code would serve the ends of justice. [Para. 8]

*K. C. Saksena and Muhammad Jalaluddin Ahmad*  
— for Appellant.

*Deputy Government Advocate* — for the Crown.

**Judgment.** — Gokaran Singh and Nawab Singh were placed on their trial for offences under ss. 379 and 304, read with S. 34, Penal Code. They were, each of them, sentenced by the learned Sessions Judge of Mainpuri to a fine of Rs. 100 under S. 379, Penal Code, or, in default, to rigorous imprisonment for one month. Gokaran Singh alone was sentenced to rigorous imprisonment for five years under the second part of S. 304, Penal Code.

[2] On the night between February 26 and 27, 1945, at about midnight, these two persons, along with one more, who remained unidentified, were

stealing gram from a field belonging to one Sheoraj, who, along with Kishori, had gone to see his field. Sheoraj raised an alarm, whereupon all the three ran away. They were, however, given a chase by both. After a short chase, Gokaran Singh hit Kishori with a spear, as a result of which he died shortly after.

[3] Both the accused pleaded not guilty. Their case was that they have been falsely implicated on account of enmity. Nawab Singh's definite plea was one of *alibi*. Gokaran denied his complicity in the crime, or in the theft. According to him, all the Ahirs of Kishori's village were thieves. There was a previous litigation between him and the Ahirs and he owed his misfortune to their enmity.

[4] The prosecution examined a large number of witnesses, among whom were Dungar, Shyam Lal, Sultan and Subedar. One of them was an eye-witness, whereas the rest were those who had received the information from Kishori himself about the part played by Gokaran in the crime. The learned Sessions Judge accepted the story for the prosecution in the main, and passed the sentences mentioned above. Gokaran alone has come to this Court in appeal.

[5] The learned counsel for the appellant contends that, in circumstances such as these, it will not be safe to sustain the conviction on the testimony of those who are relations and between whom and the accused there is admittedly bad blood. Reliance has been placed in support of this contention on [*Kholia Naiko v. Emperor*] A. I. R. 1939 Pat. 292.<sup>1</sup> I have no quarrel with the proposition laid down in this case, but, if the learned Judges meant to lay down as a dictum of universal application that in no case should a conviction be based upon the testimony of witnesses between whom and the accused the relations are strained, I, with great respect, enter my dissent from it. It is possible to conceive of a case where the only witnesses are people between whom and the accused no love is lost. It will be a ground for severe scrutiny of that evidence. It may even be a ground for receiving it with great caution but it will not be a valid ground to reject it on that ground alone.

[6] The position in the case before me is slightly different. Not only is Sheoraj one of the eye-witnesses but there are a few others who received the information from Kishori himself at a time when he had received the fatal wound. That will not be a moment when he will think of vengeance; that will be the time when he will speak out truth and nothing but truth.

[7] There is another point which has weighed with me. That Kishori died admits of no doubt. The defence does not fix the guilt upon any

1. ('39) 26 A.I.R. 1939 Pat. 292 : 179 I. C. 929.



other person. It is true that the burden of proving the case rests on the prosecution, but this would have made some breach in the story for the prosecution and lent some support to the case for the defence. It was faintly suggested in the course of the argument that it was possible that the third man who remained unidentified might have been the author of the crime. This line of argument was not adopted before the learned Sessions Judge and, even before me, it was, as I have already said, but faintly argued that the unknown man was really responsible for the crime.

[8] The question of sentence still remains to be considered. The learned counsel for the appellant contends that there was no intention on the part of the accused to kill the deceased. The accused were caught red-handed in the act of stealing the gram; they had taken to their heels. They were obstructed by Sheoraj and Kishori and what they did was not intended to seriously injure, much less kill the deceased, but only to facilitate the theft. This contention is, to my mind, correct. The learned Sessions Judge has not addressed himself to this aspect of the matter, but, from the facts established by the prosecution itself, it is manifest that there was no intention to kill. I, therefore, think that the ends of justice shall be sufficiently met if the sentence under the second part of S. 304, Penal Code, is reduced from five years to two years. The sentence of fine under S. 379, Penal Code, shall stand. With this modification I dismiss this appeal. The appellant, who is on bail, must surrender to serve out the remaining sentence.

D.R.

*Order accordingly.***A. I. R. (34) 1947 Allahabad 68 [C. N. 36.]**

MALIK AND WALI ULLAH JJ.

*Bhagwat Pershad — Defendant-Appellant v. Ganga Din, Plaintiff and another, (Pro forma Defendant) — Respondents.*

First Appeal No. 504 of 1943, De'd on 17-4-1946, from decision of Temporary Civil and Sessions Judge, Cawnpore, D/- 15-9-1943.

Transfer of Property Act (1882), S. 84—Tender—Application under S. 83 — Principal only deposited in Court—Mortgagor offering to pay cost of repairs and interest pending application — Mortgagee refusing to accept tender and to allow mortgage to be redeemed, on ground that mortgage was not then redeemable—Mortgagee held must be deemed to have waived condition of actual production of money — Tender held legal and mortgagee not entitled to interest from date thereof.

Where the mortgagor applied under S. 83 of the Act and thereafter actually deposited in Court the amount of the principal only of the mortgage and offered to pay the amount in respect of cost of repairs and interest thereon pending the application but the mortgagee refused to accept the money and allow the mortgage to be redeemed substantially on the ground

that the mortgage was not redeemable before the expiry of three years :

*Held* that the mortgagee must be deemed to have waived the condition of the actual production of the money when he insisted that he would not accept it and went further and denied the mortgagor's right to redeem the mortgage before the expiry of three years. Therefore, there was a legal tender and as the mortgagee refused to accept it he was not entitled to get any interest subsequent to the date of the tender : *Case law considered.* [Para 7]

(45-Com.) T. P. Act, S. 84, N. 5, Pts. 32 to 36.

*N. P. Asthana, Shambhu Prasad and K. B. Asthana* — for Appellant.

*B. Mukerjee and S. Zakir Ali* — for Respondents.

**Wali Ullah J.**—This is a defendant's appeal. It arises out of a suit for redemption of a usufructuary mortgage of a house executed on 1st December 1941, by Mt. Hajjan Hafizan, defendant 2, in favour of defendant 1. It was for a sum of Rs. 6000. Subsequently, on 26th October 1942, the mortgagor sold the equity of redemption to the plaintiff Ganga Din. It appears that on 28th October 1942, the plaintiff applied to the Court for redemption under S. 83, T. P. Act, and thereafter actually deposited in Court Rs. 6000 on 1st November 1942. These proceedings, however, proved ineffectual inasmuch as the mortgagee did not accept the deposit and the application was dismissed on 30th January 1943. Thereafter the plaintiff instituted the present suit for redemption on March 1943, and he also claimed mesne profits at the rate of Rs. 60 per mensem.

[2] The suit was contested on these grounds : (1) that the suit was premature, (2) that the defendant was entitled to costs of the repairs of the house to the extent of Rs. 186 and (3) that the defendant was entitled to be reimbursed in regard to the house tax and water tax paid by him in respect of the mortgaged house. Lastly (4) it was contended that the plaintiff was not entitled to mesne profits.

[3] The learned civil Judge overruled the contention of the defendant that the suit was premature. He also found that the defendant had spent Rs. 184 in effecting the repairs of the house in question and this amount together with the stipulated interest at 9 per cent. per annum came to Rs. 186. On the issue relating to the amount claimed by the defendant under the head of house tax and water tax he was of opinion that the defendant could not be properly allowed anything up to 30th January 1943, when, according to the learned Judge, a legal tender was made by the plaintiff for payment of the entire sum due under the mortgage. But as he held the plaintiff was entitled to mesne profits from 30th January 1943, he allowed a deduction on account of taxes paid by the defendant for the period subsequent to 30th January 1943. This,



according to him, came to Rs. 13-2-0 up to the date of the suit. In the result, therefore, the learned civil Judge decreed the claim for redemption on payment of Rs. 186 within a week of the date of the decision. He also decreed the claim for past mesne profits for Rs. 52-8-0 less Rs. 13-2-0 on account of taxes, i. e., Rs. 39-6-0. The claim for *pendente lite* and future mesne profits at the rate of Rs. 45 per mensem was also decreed.

[4] Learned counsel for the defendant-appellant has strongly contended that there was no valid deposit or valid tender made by the plaintiff and consequently there was no cessation of interest running under the mortgage. He has contended in effect that the amount deposited under S. 83, T. P. Act, was less than the amount found due to the defendant-appellant. It was consequently not a valid deposit as required by law. It was, therefore, ineffective so far as the question of the cessation of interest is concerned. Next it has been contended that there was no valid tender either, inasmuch as the plaintiff never actually produced the amount for payment to the defendant-appellant. In view of the finding recorded by the learned civil Judge that the defendant-appellant was entitled to Rs. 186 in addition to the principal sum of Rs. 6000 it is obvious that the deposit in Court of a sum of Rs. 6000 only was not a proper deposit within the meaning of S. 83, T. P. Act. It would, therefore, not have the effect of stopping the running of interest thenceforward.

[5] The question, however, whether there was a valid tender under S. 84 by the plaintiff stands on a very different footing. We have heard learned counsel for the parties at length. In the course of arguments learned counsel have referred us to a number of rulings. The learned Civil Judge has relied on two rulings of this Court: [Mahomed Mushtaq Ali Khan v. Bankey Lal] 18 A. L. J. 440<sup>1</sup> and [Chetan Das v. Gobind Saran] 36 ALL. 139.<sup>2</sup> He has also referred to the case of [V. R. Venkatarama Iyar v. Gopalakrishna Pillay] A. I. R. 1929 Mad. 230.<sup>3</sup> In addition to these cases, in the course of arguments in this Court, reference has also been made to the case in Venkatarayanim Garu v. Venkata Subadrayamma Jagapathi, A. I. R. 1923 P. C. 26 : 46 Mad. 108.<sup>4</sup> We have examined these cases with care. In Mohd. Mustaq Ali Khan v. Bankeylal, 18

A. L. J. 440<sup>1</sup> a Bench of two learned Judges of this Court had to deal with a case where the mortgagors had sent a notice to the mortgagees offering to pay the mortgage money and asking for redemption but the money was not actually produced or tendered to the mortgagees. It was held in that case that there was no legal tender. On the facts of that case it was held :

"In the present case it is not stated that the money was actually produced or tendered to the defendants and redemption asked. Nor is it shown that the defendants waived their right of receiving the money and agreed to accept the notice in lieu thereof."

In 36 ALL. 139,<sup>2</sup> which was followed in 18 A. L. J. 440,<sup>1</sup> it was held by two learned Judges of this Court that

"an offer by letter of the amount due on a mortgage is not a good tender within the meaning of S. 84, T. P. Act. It is necessary that the money should be actually produced unless it can be shown that the person entitled to receive the money has waived this condition."

Similarly, in A. I. R. 1929 Mad. 230,<sup>3</sup> two learned Judges of the Madras High Court observed as follows :

"Where a party refuses to entertain the idea of payment from the tenderer at all and puts it out of his power to offer payment in a manner acceptable to the creditor, the offer of performance by a person able to carry out the promise in its entirety is a valid tender in spite of the form of it being itself not legal tender."

Here the tender was by means of a cheque which the creditor declined to accept. He, however, did not merely object to the form of the tender, i. e., tender by cheque, but he refused point blank to accept payment altogether. Reference may also be made to the case of [Jotilal v. Fateh Bahadur], A. I. R. 1929 Pat. 397.<sup>5</sup> In that case a tender of the entire amount was made by the mortgagor and a request was made that the mortgagee should accept what was just on accounts being taken but the mortgagee not merely disputed the accounts but refused to make any account and instituted a suit. It was held that there was a valid tender and the mortgagee's conduct was such as not to entitle him to any interest accruing after the date of tender. In the recent case in A. I. R. 1923 P. C. 26,<sup>4</sup> it was held by their Lordships of the Privy Council that :

"If a mortgagee unequivocally refuses a proposed payment of the amount due, the mortgagor is not bound to make a formal tender of it, and the mortgagee cannot recover interest accruing subsequently, even if he proves that the mortgagor had not the money or the control of it."

[6] Their Lordships of the Privy Council quoted with approval the following passage from the judgment of Vice-Chancellor Wigram in [Hunter v. Daniel], (1845) 4 Hare 420<sup>6</sup> at p. 423 :

1. ('20) 7 A.I.R. 1920 All. 204 : 42 All. 420 : 55 I. C. 991 : 18 A. L. J. 440.

2. ('14) 1 A.I.R. 1914 All. 53 : 36 All. 139 : 22 I. C. 659.

3. ('29) 16 A. I. R. 1929 Mad. 230 : 52 Mad. 322 : 116 I. C. 844.

4. ('23) 10 A. I. R. 1923 P. C. 26 : 46 Mad. 108 : 50 I. A. 41 : 71 I. C. 1035 (P. C.).

5. ('29) 16 A. I. R. 1929 Pat. 397 : 123 I. C. 796.

6. (1845) 4 Hare 420 : 14 L. J. Ch. 194.



"The practice of the Courts is not to require a party to make a formal tender where from the facts stated in the bill or from the evidence it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money."

It would appear that even in England where the rule in regard to tender was more rigid than in Indian law the old rule that the money should be actually produced and shown to the creditor, for though the creditor may at first refuse, yet the sight of the money may tempt him to take it, has now become obsolete. If the debtor is ready to produce the money and offers to pay it, and the creditor dispenses with production at the time, that is sufficient.

[7] In the light of the authorities referred to above, we have to see what happened in the present case which, according to the plaintiff, amounted to a legal tender. While the application under S. 83 was pending, it appears that the plaintiff offered to pay the amount to the defendant-mortgagee in respect of cost of repairs and interest thereon. The mortgagee, however, refused to accept the money and to redeem the mortgage substantially on the ground that the mortgage was not redeemable before the expiry of three years. This is clear from two documents on the record: Paper No. 67-C which records a statement made by the Vakil for the mortgagor on 30-1-1943, and paper No. 68-C which contains a statement made by the Vakil of the mortgagee-defendant-appellant on the same date. It is obvious, therefore, that the mortgagee must be deemed to have waived the condition of the actual production of the money when he insisted that he would not accept it and went further and denied the plaintiff's right to redeem the mortgage before the expiry of three years. The finding of the learned Civil Judge, therefore, that there was a legal tender on 30-1-1943 and as the mortgagee refused to accept it he is not entitled to get any interest for the period subsequent to that date is quite correct.

[8] In the result, therefore, we are of opinion that there is no force in the contentions of the learned counsel and the appeal is accordingly dismissed with costs.

V.R.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 70 [C. N. 37.]**

ALLSOP AND MATHUR JJ.

*Har Prasad — Applicant v. Emperor.*

Criminal Ref. Nos. 834 and 835 of 1945, Decided on 1-5-1946.

U. P. Motor Vehicles Rules (1940), Rules 78 and 83 — "Conductor" meaning of — Rules; when read together mean that vehicle carrying more than twelve passengers must carry attendant who must have licence as required by R. 83.

The word "conductor" as used in R. 83 must be treated in its ordinary sense. The attendant to whom

reference is made in R. 78 is a 'conductor' within the meaning of that word as ordinarily used. Therefore the meaning of the Rules 78 and 83 read together is that no vehicle authorised to carry more than twelve passengers shall be driven unless there is carried on it an attendant and that such an attendant where the vehicle is a stage carriage must have a licence according to the provisions of R. 83. [Paras 3 and 4]

*Deputy Government Advocate — for the Crown.*

**Allsop J.** — One Har Prasad was convicted in two cases of contraventions of R. 83, Motor Vehicles Rules, 1940, and was fined Rs. 10 in each case. The learned Sessions Judge of Muttra has referred both the cases to us, because he is of the opinion that no offence was committed. Rule 83 in so far as it is relevant is as follows:

"No person shall work as a conductor of a stagecarriage, and no employer shall so employ any person, unless such person holds a conductor's license."

[2] The finding of fact is that Har Prasad's motor bus or motor lorry which was licensed to carry more than 12 passengers was being used on each occasion without the assistance of a conductor. In one case at least into which we have looked, it appears that Har Prasad stated that he was driving the lorry or bus and that he had with him a cleaner, but it is quite clear that he had at least no licensed conductor. The learned Judge has referred to R. 78, Motor Vehicles Rules, 1940, which is as follows:

"(a) No transport vehicle authorized to carry more than twelve passengers, or, where passengers and goods are carried, authorized to carry a combined load of passengers and goods in excess of 15 cwt., shall be driven in any public place for the conveyance of passengers unless there is carried on such vehicle in addition to the driver, an attendant, and no such attendant shall be less than eighteen years of age.

(b) The attendant shall be carried at the rear of the vehicle to signal to the driver the approach of other traffic from behind and to attend on the passengers and to assist them where necessary in entering and leaving the vehicle."

[3] The learned Judge suggests that there is no provision in this rule that a conductor shall be carried on such a vehicle, and he says that R. 83 does not direct that any conductor shall be carried. We may assume that in the other case the facts were similar. The learned Judge has been influenced by the fact that R. 78 originally provided that a conductor or an attendant should be carried in the transport vehicles with which the rule deals, but that the word "conductor" was later deleted by an amendment. He has made a distinction between an attendant and a conductor. He seems to us to have overlooked the fact that Har Prasad was not convicted of a breach of R. 78, but of a breach of R. 83. We do not think that there is any reason for us to interfere with the convictions and the sentences, because in substance, Har Prasad was guilty of a breach of the rules. If he had no attendant at all, he was guilty of a breach of



R. 78. On the other hand, if he had as he says he had, an attendant, that is a cleaner, but this attendant was not licensed to perform the duties of a conductor, then he was rightly convicted of breach of R. 83. We think that some confusion has been caused about the meaning of the word 'conductor.' In the Oxford English Dictionary, this word is defined as meaning an official who has charge of the passengers, collection of fares, and generally directs the proceedings of an omnibus. It is clear that the attendant to whom reference is made in R. 78, is a conductor within the meaning of that word as defined in the dictionary. The word is also defined in the Motor Vehicles Rules 1940. The definition is in the following terms :

" 'Conductor,' in relation to a stage carriage, means any person appointed by the registered owner and authorized by the registering authority in this behalf to travel on the said vehicle and to discharge the duties of the conductor of the said vehicle."

[4] According to this definition, a conductor would only mean a licensed or authorized conductor and it might be suggested that this would lead to some confusion in R. 83, but we must point out that R. 83 does not say that no person shall be a conductor or be employed as a conductor but that no person shall work as a conductor or shall be employed to work as a conductor. The definition in the rules is not properly speaking a definition, because it implies that the meaning of the term 'conductor' is already known where it speaks of a person being appointed or authorized to discharge the duties of the conductor of the vehicle. We think, therefore, that we must treat the word 'conductor' as used in its ordinary sense, and, in our judgment, the meaning of Rr. 78 and 83 read together is that no vehicle authorized to carry more than twelve passengers shall be driven unless there is carried on it an attendant, and that such an attendant where the vehicle is a stage carriage, must have a licence according to the provisions of the later rule. We would, however, suggest to the local Government that they might examine their rules with a view to their amendment as they are somewhat confusing to the Courts that have to enforce them. If the term 'attendant' were substituted for the word 'conductor' in R. 83 the position would be clearer. As the rules at present stand, there is apt to be no sufficiently clear distinction between an attendant who is not a conductor and one who is a conductor for the purposes of R. 83. With these remarks we reject both the references.

N.S.

*References rejected.*

**A. I. R. (34) 1947 Allahabad 71 [C. N. 38.]**

MULLA AND SINHA JJ.

*Fatta—Applicant v. Emperor.*

Cri. Ref. No. 1324 of 1945, Decided on 9-8-1946, from order of Sessions Judge, Saharanpur, D/- 22-8-1945.

Criminal P. C. (1898), S. 339 — Certificate of Public Prosecutor is sole basis for prosecution of approver for original offence — Public Prosecutor's agreeing with Magistrate is not alone sufficient for such prosecution.

The whole and sole basis of the prosecution of a person, to whom pardon has been tendered under S. 337 for the offence in respect of which the pardon is tendered, is a certificate by the Public Prosecutor that in his opinion "any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made." Until this condition laid down by S. 339 is fulfilled, there can be no valid basis for the prosecution of a person to whom a pardon is tendered under S. 337 for the offence in respect of which the pardon has been so tendered. This condition cannot be fulfilled by the Public prosecutor agreeing with the opinion of the Magistrate that the approver should be prosecuted for the original offence : (25) 12 A. I. R. 1925 Bom. 135, *Rel. on.* [Paras. 3 and 4]

('46-Com.) Criminal P. C., S. 339, N. 2.

*M. A. Kazmi* — for Applicant.

*Deputy Government Advocate* — for the Crown.

**Order.** — This is a reference by the learned Sessions Judge at Saharanpur. It arises in the following circumstances : The opposite party, Fatta, was committed to the Court of the learned Sessions Judge along with several other persons to take his trial on a charge under S. 397, Penal Code. Soon after the trial opened, it was found that Fatta had originally been tendered a pardon by the Committing Magistrate, but that pardon had been subsequently withdrawn and he had been committed along with the other accused persons to the Court of Sessions. The admitted facts of the case are that the Committing Magistrate in this case tendered a pardon to Fatta on 8-1-1945. This pardon could not but have been tendered under S. 337, Criminal P. C. It appears that he was examined as a witness in Court on the same date and he then denied that he had participated in any dacoity. Upon this statement, the learned Magistrate immediately withdrew the pardon tendered to Fatta and put him in the dock along with the other accused persons and eventually committed him to the Court of Sessions. When the learned Judge found that Fatta had thus been given a pardon which had been withdrawn, he separated his case from that of the other accused persons. The other accused persons were tried in due course. With regard to Fatta the learned Sessions Judge has made this reference with the recommendation that the commitment proceeding in relation to him should be quashed.



[2] The ground, upon which the reference is based, is that the Committing Magistrate had no jurisdiction to withdraw the pardon tendered to Fatta. The learned Judge has referred to the provisions of ss. 337 and 339, Criminal P.C., and has made certain other points, but the real ground, upon which his reference is based, is that which we have already mentioned, namely, that the Committing Magistrate having once tendered a pardon to Fatta under S. 337, Criminal P. C., had no jurisdiction in law to withdraw it. Fatta is represented by counsel who naturally supports the reference. We have heard learned counsel for the Crown, but we find that the ground taken by the learned Sessions Judge is absolutely unassailable. The learned Committing Magistrate has furnished an explanation which we have also considered, but we find that he has totally ignored the real point in the case and the provisions of S. 339, Criminal P. C. According to him, when he examined Fatta as a witness and Fatta stated that he knew nothing about the dacoity, the legal result of his denial was that he reverted to his original position as an accused and "the pardon thus came to an end *ipso facto*." We need only say that in arriving at this conclusion the learned Magistrate was hopelessly wrong. Once it is admitted that a pardon was tendered to Fatta under S. 337, Criminal P. C., it necessarily follows that there must be some legal authority for withdrawing that pardon and the question really is whether the Committing Magistrate was really armed with such authority. For that purpose it is essential to refer to the provisions of S. 339, Criminal P. C., for there is no other provision in law which can govern the question which arises in the present case. Section 339 runs as follows :

"Where a pardon has been tendered under S. 337 or S. 338, and the Public Prosecutor certifies that in his opinion any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter . . . . ."

[3] It is clear from the language of S. 339 that the whole and sole basis of the prosecution of a person, to whom pardon has been tendered under S. 337, Criminal P. C., for the offence in respect of which the pardon is tendered, is a certificate by the Public Prosecutor that in his opinion "any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made." Until this condition laid down by S. 339 is fulfilled, there can be no valid basis for the prosecution of a person to whom a pardon is tendered

under S. 337, Criminal P. C., for the offence in respect of which the pardon has been so tendered. The position appears to us to be so clear that it is not really necessary to refer to any authorities on this point, but we find that the same view has been taken by a Division Bench of the Bombay High Court in the case of [Emperor v. Maria Basappa], reported in A.I.R. 1925 Bom. 135.<sup>1</sup> The learned Judges have held in that case that "sub-s. (1) of S. 339 as amended by the Act of 1923 makes the certificate by a Public Prosecutor the sole basis of a prosecution of an approver and therefore, an approver cannot be prosecuted at the instance of or on a suggestion by the presiding Judge that he should be so dealt with." From the explanation furnished by the learned committing Magistrate it appears that he did not realise the importance of the provisions contained in sub s. (1) of S. 339, Criminal P. C. At the very end of his explanation he has referred to this matter and has made the following observation :

"The P. I. was the Public Prosecutor for my Court and he agreed to the decision arrived at by me in respect of patta."

[4] Even from this observation it is clear that the learned Magistrate thought that he had some authority to arrive at some decision which is obviously wrong. As we have already pointed out, the basis of a prosecution in such a case is wholly and solely the certificate of the Public Prosecutor and this condition cannot possibly be fulfilled by the Public Prosecutor agreeing with the opinion of the Magistrate. The result, therefore, is that we accept this reference and quash the commitment proceeding in respect of Fatta. We leave it to the authorities concerned to proceed in accordance with the law.

N.S.

*Commitment quashed.*

1. (25) 12 A. I. R. 1925 Bom. 135 : 85 I. C. 149.

**A. I. R. (34) 1947 Allahabad 72 [C. N. 39.]**  
SINHA J.

*Wahid-uz-zafar Khan — Appellant v. Emperor.*

Criminal Appeal No. 773 of 1945, Decided on 18-9-1946, from order of Sessions Judge, Benares, D/- 29-11-1945.

Criminal P. C. (1898), S. 297—Charge to jury — Duty of Court — Sessions Judge must properly explain law to jury — Duty of explaining must be done by Judge himself — Judge telling jury that explaining law is unnecessary as pleader has already explained same—Charge is not proper.

Trial by jury is a wholesome institution, but it, at the same time, casts a very heavy responsibility on the Sessions Judge to properly explain the law to the jury. This is necessary in view of the fact that the law attaches special sanctity to its verdict. Once the jury has returned a verdict, the Court has to accept it, except for the reasons indicated in S. 307. This duty of explaining the law to enable the members of the jury



to return a correct verdict the Judge has to do himself. It cannot be left to be done vicariously : 17 A. I. R. 1930 All. 24, *Foll.*; 29 Cal. 379, *Rel. on.* [Para 8]

Where, therefore, a Sessions Judge in his charge to the jury says that it is not necessary for him to explain the law as the Government pleader has already explained the offence with which the accused person has been charged, there is no proper charge to the jury and the trial is vitiated by an error of law. [Paras 7 and 9]

Cr. P. C. — ('46 Com.) S. 297, N. 9, Pt. 25.

Z. H. Lari and S. N. Singh — for Appellant.

Deputy Government Advocate — for the Crown.

**Judgment.** — This is an appeal under S. 410, read with S. 418, Criminal P. C., against an order of the learned Sessions Judge of Benares. The case was tried with the assistance of a jury and the appellant has been sentenced to rigorous imprisonment for nine months under S. 342 and to rigorous imprisonment for three years under S. 211, Penal Code. The sentences have been directed to run concurrently.

[2] The appellant was a Platoon Commander in the Special Armed Constabulary and was stationed at Babatpur, in the district of Benares. The case for the prosecution is that, on the afternoon of 15-1-1945, the appellant, Wahid-uz-zafar Khan, along with three other persons, Jumman, Ghayasuddin and Aziz Ahmad went to Mauza Ahirabirpur, at the house of a man named Banshi. The relations between this Banshi and Mahabal and Chet Narain were strained. At their instance he, without any justification, arrested Banshi and took him to his station. On the next morning, i.e., on the morning of 16-1-1945 Jumman, Ghayasuddin and Aziz Ahmad took Banshi to the S. A. C. Commandant at Benares. The Commandant satisfied himself that the arrest of Banshi was a proper arrest and sent him to the Central Police Station, Benares. Jai Narain Singh, the Sub-inspector, who was entrusted with the investigation, found that the case against Banshi was false.

[3] The above is, in brief, the story for the prosecution. The appellant, along with Jumman, Ghayas, Aziz, Mahabal and Chet Narain, was placed on his trial before the learned Sessions Judge under ss. 211 and 342, Penal Code. The trial was held, as said above, with the aid of a jury. The jury returned a unanimous verdict of not guilty as against the others, but found the appellant guilty. The learned Sessions Judge accepted the verdict and passed the sentence mentioned above. The appellant has come to this Court in appeal.

[4] The case has been argued with ability and succinctness by Mr. Lari, the learned counsel for the appellant. The right of appeal given to an accused person, who had the benefit of a trial by jury, is restricted. That right can be found only within the four corners of S. 418,

Criminal P. C. It is only a question of law on which this Court can be moved. The learned counsel has, however, substantiated his position by a reference to the relevant portions in the charge of the learned Sessions Judge to the jury.

[5] It is not the case of the learned counsel that the charge was tendentious. Nor is it his case that the prosecution having failed, on practically the same evidence against the others, the case against him must also fail. His case is that the learned Sessions Judge fell into an obvious fallacy with regard to S. 211, Penal Code, and did not do his duty at all with regard to S. 342 of that Code. Section 211 says:

"Whoever, . . . institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, . . ."

At page 155 of the typed paperbook is to be found the relevant portion of the charge. Says the learned Sessions Judge :

"There is the evidence that it was Wahiduzzafar who was approached for the release of Banshi and declined to release him. If you believe this evidence, it will be open to you to hold Wahiduzzafar responsible for the arrest and the wrongful confinement of Banshi whether he himself went to Ahirabirpur or not. In that event a case under S. 211, Penal Code, would also be made out against him. *For he sent a report to the police at Benares which was not true.*" (The italics are mine).

[6] The learned counsel contends that all that the appellant on his return to his station did was to make a note of what he had done at Ahirabirpur. He had never sent a report to the police at Benares. The learned Crown counsel is unable to place before me anything on the record to support the observation of the learned Sessions Judge that Wahiduzzafar "sent a report to the police at Benares which was not true." If this is so, it is a clear case of misdirection to the jury. The case under S. 211, Penal Code, must, therefore, fail.

[7] Coming to the other charge of wrongful confinement within the meaning of S. 342, Penal Code, learned Sessions Judge did not explain the law on the subject to the jury. I shall let him speak in his own words :

"I have already explained section 211 of the Indian Penal Code to you. It is unnecessary for me now to explain the other section, viz. 342 of the Indian Penal Code. The learned Government Pleader has already explained to you the offences with which the accused persons have been charged."

[8] There is no doubt in my mind that this involves a failure of duty. Trial by a jury is a wholesome institution, but it, at the same time, casts a very heavy responsibility on the learned Sessions Judge to properly explain the law to the jury : *vide* [Emperor v. Mohammad Israil] 1929 A. L. J. 1261.<sup>1</sup> This is necessary in view of the fact that the law attaches special sanctity

1. ('30) 17 A. I. R. 1930 All. 24 : 120 I. C. 264 : 1929 A. L. J. 1261.



to its verdict. Once the jury has returned a verdict, the Court has to accept it, except for the reasons indicated in S. 307, Criminal P. C. This duty of explaining the law to enable the members of the jury to return a correct verdict the Judge has to do himself. It cannot be left to be done vicariously. This was the view taken in [Mangan Das v. Emperor] 29 Cal. 379.<sup>2</sup> The learned Sessions Judge in that case too did almost the same which the learned Sessions Judge in the case before me has done. Said he :

"The law bearing on the case has been placed before you more than once in the addresses delivered by the learned pleaders on either side. I need not go into detail as to the law therefor."

Criticising the procedure the learned Judges of the High Court observed as below :

"It is immaterial how much or how often the Jury may have been addressed by the pleaders on both sides upon the law. The responsibility of laying down the law for the guidance of the jury rested entirely with the Judge, and the verdict arrived at by the jury in the absence of any such direction on the law by which they should be guided cannot be accepted as a valid verdict in the case."

[9] It is, therefore, obvious that there was no proper charge to the jury and the trial was vitiated by this error of law. The next question is whether circumstances of the case demand a re-trial. I do not think that they do demand a retrial, more particularly when all the other accused have been acquitted on practically the same evidence.

[10] I, therefore, allow the appeal and set aside the conviction and sentence of the accused. He shall be set at liberty forthwith unless required in connection with any other case. It is needless to say that the appellant, who is a young man of 24 leaves the Court without a stain.

V.R.

*Appeal allowed.*

2. ('02) 29 Cal. 379.

### A. I. R. (34) 1947 Allahabad 74 [C.N. 40] FULL BENCH

VERMA, BRAUND AND HAMILTON JJ.

*Munshi Lal — Defendant — Appellant v. Hira Lal and another, Plaintiffs and others, Defendants — Respondents.*

First Appeal No. 107 of 1940, Decided on 11-4-1946, from decision of Civil Judge, Bulandshahr, D/-30-3-1939.

(a) Transfer of Property Act (1882), S. 101 — Property comprised in intermediate mortgage also comprised in subsequent mortgage — Subsequent mortgagee can avail himself of his prior mortgage as shield against intermediate mortgagee — Subsequent mortgagee invoking assistance of prior mortgage really sues on cause of action constituted by both mortgages — Subsequent mortgagee can only rely on prior mortgage if, apart from S. 101, it was capable of being sued upon at date of subsequent mortgage.

A plaintiff suing as a mortgagee under a subsequent mortgage is entitled to avail himself of his interest in a

prior mortgage as a shield against an intermediate mortgagee's estate in so much of the property comprised in the subsequent mortgage as was also comprised in the intermediate mortgage and has been acquired by the intermediate mortgagee in execution of the decree based on the intermediate mortgage. The effect of the operation of S. 101 and of the principles on which it is based is that they merely prevent a merger or, in other words, keep the prior mortgage alive, subject always to any question of limitation. When the later mortgagee comes to invoke the assistance of the earlier mortgage as a protection against the intermediate estate, he is really suing on the cause of action constituted by the earlier mortgage as well as on the cause of action constituted by the later one. It is for this very purpose that the cause of action on the earlier mortgage is kept alive : 16 Cal. 523 and 23 All. 313 (P. C.), *Ref.*

[Para 12]

The circumstance that it is the prior mortgage itself which alone gives to the later encumbrancer or purchaser his title to priority over any intervening estate seems to lead logically to the conclusion that the later mortgagee or purchaser can only rely on the prior mortgage if, apart from S. 101, it was capable of being sued on at the date of the subsequent mortgage. The effect of the principle involved in S. 101 is to "keep alive" the prior incumbrance, and not to "give it a rebirth." Thus, a mortgage, which at the date of the subsequent incumbrance, is already dead in the sense that, owing to the operation of the Limitation Act, it cannot be sued upon, will not be revived as a protection against an intermediate incumbrancer. [Para 14]

T. P. Act —

('45-Com) S. 101, N. 3, Pt. 2 ; N. 10, Pts. 1 and 4.

(b) Limitation Act (1908), S. 19 — Acknowledgment by mortgagor to prior mortgagee — Intermediate mortgagee's title accruing before acknowledgment — Intermediate mortgagee can rely upon Limitation Act as bar — Principle applies whether or not mortgagor parts with his interest altogether.

An acknowledgment given by a mortgagor in favour of a prior mortgagee does not preclude an intermediate mortgagee, whose title accrued before the acknowledgment was given, from relying on the Limitation Act as a bar. The principle applies no less to a case in which the mortgagor giving the acknowledgment has retained some scintilla of interest in the form of an equity of redemption than to a case in which he has parted with his interest altogether : 1 C. L. J. 337 ; (1863) 2 De. G. J. & S. 122 and 29 A. I. R. 1942 P. C. 67, *Rel. on* ; 31 A I.R. 1944 Nag. 163-(F. B.), *Ref.* [Paras 17 and 19]

Limitation Act —

('42-Com) S. 19, N. 35, Pt. 1.

(c) Interpretation of statutes—Liberal construction must be given to Act curtailing rights.

[Para 18]

(d) Limitation Act (1908), S. 19—Document constituting acknowledgment — Document must be construed in its context — Language of document not clear — Context may be examined to see to what the words refer — Suit upon intermediate mortgage — Subsequent mortgagees impleaded—Latter holding prior mortgages—Plaintiff submitting in application to Court that subsequent mortgagees were prior mortgagees as they had obtained simple mortgage in lieu of prior debt—Subsequent mortgagees removed from array of defendants—Considering context application held constituted acknowledgment — One of prior mortgages time-barred at time of acknowledgment — Acknowledgment held could not support right to priority in respect of that mortgage.



A document said to constitute an acknowledgment has to be construed in the context in which it is given and where its language is not clear in itself, the context may be examined to see what it is to which the words refer. That is not to say that any equivocation in an acknowledgment can be cured by ascertaining what the probable intention of the acknowledgment was. But where after examining in the light of the context what it was that the person giving the acknowledgment was actually referring to, the conclusion follows that it is an unequivocal acknowledgment of a right then that acknowledgment is sufficient to satisfy S. 19. [Para 22]

In a suit upon an intermediate mortgage the subsequent mortgagees who also held two prior mortgages were impleaded as defendants 3 and 4. The plaintiff made an application to the Court submitting that defendants 3 and 4 had obtained a simple mortgage in lieu of the prior debt due to them and that, therefore, they were prior mortgagees and it was not necessary that they should be made parties to the suit. The Court granted his prayer to remove their names from the array of the defendants.

*Held* that read in its context, the only things that the intermediate mortgagee could have been referring to in the application when he spoke of the prior debts and the prior rights of the subsequent mortgagees were the debts and rights under the prior mortgages and as these debts and rights did exist and it was not alleged that there were any other mortgages or rights which might lead to any equivocation in the acknowledgment, therefore, on its true construction the application could only be taken as constituting an acknowledgment by the intermediate mortgagee both of the existence of the prior mortgages and his own liability in respect of the right of priority of those mortgages. [Paras 22 and 23]

*Held further* that one of the prior mortgages having already become time-barred at the time of the acknowledgment, the acknowledgment could not be relied upon to support a right of priority derived through that mortgage. [Para 22]

#### Limitation Act —

(‘42-Com) S. 19, N. 12, Pt. 1 ; Notes 32 and 47.

C. B. Agarwala — for Appellant.

S. B. L. Gour — for Respondents.

#### Cases referred :—

1. (‘89) 16 Cal. 523, Gopal Chunder v. Herembo Chunder.
2. (‘01) 23 All. 313 : 28 I. A. 203 : 8 Sar. 72 (P. C.), Shanker Sarup v. Mejo Mal.
3. (‘45) 1945 A. L. J. 292 : 32 A. I. R. 1945 All. 239 : I.L.R. 1945 All. 733 (F.B.), Munna Lal v. Chunni Lal.
4. (‘05) 1 C. L. J. 337, Surji Ram v. Barham Deo.
5. (‘42) I. L. R. 1942 All. 660 : 29 A. I. R. 1942 P. C. 67 : I. L. R. (1942) Lah. 686 : I. L. R. (1942) Kar. P. C. 153 : 69 I. A. 130 : 202 I. C. 740 (P. C.), Bank of Upper India, Ltd. v. Robert Hercules Skinner.
6. (1863) 1 De. G. J. & S. 122 : 32 L. J. Ch. 219 : 7 L.T. 812 : 11 W. R. 386, Bolding v. Lane.
7. (‘44) 31 A. I. R. 1944 Nag. 163 : I. L. R. (1944) Nag. 383 : 216 I. C. 296 (F. B.), Radha Kishan Ram Lal v. Hazarilal.

**Braund J.** — This is a first appeal referred to us as a Full Bench. A certain Abdul Rahman was the owner of some 276 bighas of land in a village in the Bulandshahr District. Abdul Rahman died prior to 1914, leaving a widow, Mt. Hakimunnissa and five children—four sons and one daughter. The sons were Abdul Rashid, Abdul Noor, Abdul Shakur and Abdul Ghafur and the daughter was Mt. Tamizunnissa. Under

Mohammadan Law Abdul Rahman’s property descended as to 14 shares or *sihams* to each of his four sons, as to seven shares or *sihams* to his daughter, Mt. Tamizunnissa, and as to 9 shares or *sihams* to his widow, Mt. Hakimunnissa.

[2] By a mortgage (hereinafter called the ‘1914 mortgage’) dated 12th June 1914, the three sons, Abdul Noor, Abdul Shakur and Abdul Gafur, charged their respective 14 *sihams* shares (making 42 *sihams* in all) in favour of Hira Lal and Chiranji Lal, the plaintiffs in the present suit, together with one Durga Prasad, as mortgagees to secure a principal sum of Rs. 2000, and interest at the rate of eight annas per centum per mensem, calculated with six monthly rests.

[3] By a second mortgage (hereinafter called ‘1918 mortgage’) dated 27th May 1918, the same three sons, together with Mt. Hakimunnissa, the widow, charged the same 42 *sihams* as were included in the 1914 mortgage, together with the nine *sihams* of the widow (making 51 *sihams* in all) to the mortgagees of the 1914 mortgage to secure the further principal sum of Rs. 2700, with interest thereon at the rate of seven annas per centum per mensem, calculated at yearly rests.

[4] By a third mortgage (hereinafter called the ‘1919 mortgage’) dated 14th February 1919, the two sons, Abdul Noor and Abdul Shakur, mortgaged the equity of redemption in their respective 14 *siham* shares to Gokul Chand and Kallu Mal, subject to the 1914 and 1918 mortgages respectively, to secure a principal sum of Rs. 1500 and interest thereon. It is with this mortgage that the questions in this suit are concerned.

[5] At that point Mt. Hakimunnissa died. On her death, her nine *siham* shares (subject to the 1918 mortgage) descended as to two *sihams* each to Abdul Rashid, Abdul Noor, Abdul Shakur and Abdul Ghafur respectively, and as to the remaining one *siham* to Mt. Tamizunnissa. After that nothing further occurred for seven years. On 2nd February 1926, yet another mortgage (hereinafter called the ‘1926 mortgage’) was entered into by the two sons, Abdul Noor and Abdul Shakur, of their several respective 16 *siham* shares (being their original 14 *sihams*, together with the two *sihams* which had accrued to them respectively on the death of their mother) and by Mt. Tamizunnissa of four out of her eight *siham* shares, in favour of Hira Lal and Chiranji Lal, who were two of the mortgagees under the 1914 and 1918 mortgages respectively, to secure a principal sum of Rs. 3250 together with interest at the rate of seven annas six pies per centum per mensem,



calculable with yearly rests. The 1926 mortgage instrument is Ex. 6 in the proceedings before us. It recites the devolution of the property in the manner set out above and refers to the debts due under the 1914 and 1918 mortgages as debts which Abdul Noor, Abdul Shakur and Mt. Tamizunnissa were liable to pay, by reason of the fact that they were debts presumably originally incurred by the parent, Abdul Rahman, in the year 1906. The 1926 mortgage instrument then proceeded to notice that the 1914 mortgage was about to become barred by limitation and that the aggregate sum for principal and interest at that date outstanding on the 1914 and 1918 mortgages together amounted to Rs. 6418. After those recitals, the 1926 mortgage went on to allocate the fresh loan of Rs. 3250, as to Rs. 3209 (being half of the gross amount outstanding on the 1914 and 1918 mortgages) to the *pro tanto* redemption of those mortgages, and as to the balance of Rs. 41 by payment to the 1926 mortgagors in cash. It then charged the entire 36 *siham* shares of Abdul Noor, Abdul Shakur and Mt. Tamizunnissa with the repayment of the principal sum of Rs. 3250, together with interest thereon, in favour of the two mortgagees who are the plaintiffs in the present suit. We are told that the other half of the 1914 and 1918 mortgages has since been paid off from other sources.

[6] The next event was that by a suit begun by a plaintiff of June 1929. Gokul Chand and Kallu Mal, the mortgagees under the 1919 mortgage, sued for sale of the 28 *sihams* comprised in that mortgage, and, on 18th October 1930, obtained a final decree. This decree was in due course transferred to Munshi Lal, the present defendant-appellant. He, in turn, in execution of the decree, himself in 1932 purchased half the property, i. e., half the twenty-eight *sihams* — comprised in the 1919 mortgage, and entered into possession of the shares so purchased on 24-2-1933. The plaintiff in this suit of 1929 originally included Hira Lal and Chiranji Lal, the 1926 mortgagees as defendants, on the ground presumably that they were mortgagees *subsequent* to the 1919 mortgage. But at a very early stage of the suit an application was made by the plaintiffs, in circumstances which will be explained in greater detail later on, to dispense with Hira Lal and Chiranji Lal as defendants on the ground that they were in truth not subsequent, but prior mortgagees, and so unnecessary parties. The application to "exempt" the two 1926 mortgagees from the 1929 suit, and its language, will have to be considered when it comes to seeing how far it constituted an acknowledgment by the 1919 mortgagees that the 1926 mortgage was entitled to priority over the 1919 mortgage.

[7] On 4-7-1938, the present suit was started by Hira Lal and Chiranji Lal (the mortgagees under the 1926 mortgage) and it is necessary, in view of the issues involved, to refer to the plaint in some detail. The defendants to the suit were Abdul Noor, the representatives of Abdul Shakur, who was himself then dead, Mt. Tamizunnissa, a certain Abdulla Khan (with whom we are not at the moment concerned), and the present appellant, Munshi Lal. Thus there were before the Court the three mortgagors under the 1926 mortgage, or their representatives, and also Munshi Lal, who in 1932 had become the purchaser in the execution sale of part of the property comprised in the 1919 mortgage. Neither the fourth brother Abdul Ghafur, nor his representatives, were parties to the suit. The plaint by para. 2 set out the particulars of the 1926 mortgage only, describing the sum secured as being the sum of Rs. 3250 secured by that mortgage and the security as consisting of the sixteen *siham* shares of Abdul Shakur, the sixteen *siham* shares of Abdul Noor and the four *siham* shares of Mt. Tamizunnissa. By para. 7, the plaint explained that the cause of action arose on 2-2-1926—the date of the execution of the 1926 mortgage—and the relief claimed was that: "A sum of Rs. 3250 the principal and Rs. 3082 the interest according to the new law, in all Rs. 6332, may be caused to be awarded to the plaintiffs against the defendants within a time to be fixed by the Court, otherwise after the expiry of the period, the amount due to the plaintiffs may be caused to be paid by sale of the mortgaged property," i. e. of the property charged by the 1926 mortgage.

[8] Neither in this appeal nor in the Court below has any one questioned the validity of the suit on the ground that it is beyond limitation, and we do not, therefore, pause to consider the reasons which may account for the note which appears at the end of the plaint of 4-7-1938, stating that the period of limitation for the suit expired only on 30-6-1938 during the long vacation and that, accordingly, the date of the filing of the plaint was 4-7-1939, the day of the re-opening of the Courts.

[9] The plaint concluded with a further specification of the property comprised in the 1926 mortgage. By his defence, the defendant, Munshi Lal, claimed that he was not a "subsequent purchaser of the property in question but was on the other hand, "the purchaser of the prior charge." We think this must be taken to imply, as was done in the Court below, that the present appellant asserted his title to the property comprised in the 1919 mortgage acquired by his purchase of 1932 in priority to the mortgage of 1926. The learned Civil Judge of Bulandshahr, who tried the case in the Court below, therefore,



treated the pleadings as raising an issue whether the effect of the 1926 mortgage was to keep alive the mortgages of 1914 and 1918 respectively in favour of the plaintiffs, so as to preclude the appellant, Munsi Lal, from relying on his purchase of 1932 in execution of the 1919 mortgage decree as giving him a title to the property purchased in priority to the 1926 mortgage. The actual issues framed by the learned Judge, so far as this question was concerned, were :

"2. Whether defendant 11 is a purchaser under prior incumbrance and whether the property purchased by him is liable to be sold in this debt ? and

4. Whether the plaintiff is entitled to sell the property on this debt without payment of the charge of defendant 11."

[10] The learned Judge on these issues decided that the effect of the 1926 mortgage was that the plaintiffs were entitled to enforce their security in priority to the title of Munshi Lal derived under the 1919 mortgage, and he accordingly passed a decree in the suit which was in effect (though certainly not in form) a decree based upon the 1914 and 1918 mortgages as well as on the 1926 mortgage.

[11] Those, briefly stated, are the facts of the case. As the learned Judge in the Court below rightly recognized, the first issue was whether the plaintiffs, suing as mortgagees under the 1926 mortgage, were entitled in this suit as framed to avail themselves of their interest in the 1914 and 1918 mortgages as a shield against the appellant's estate in so much of the property comprised in the 1926 mortgage as was also comprised in the 1919 mortgage and had been acquired by the appellant in execution of the decree based on the latter mortgage.

[12] We have no doubt that in the present case S. 101, T. P. Act, 1882, and its principle, did apply, with the result that, subject to the questions of limitation dealt with later, the 1914 and 1918 mortgages were not extinguished, as between mortgagor and mortgagee as a shield against the 1919 mortgage, and for that purpose did not merge in the mortgage of 1926. The only matter that has caused us some slight difficulty is the form of the present suit which on its face is a suit based on a cause of action constituted by the 1926 mortgage. We think that the effect of the operation of S. 101, T. P. Act, 1882, and of the principles on which it is based is that they merely prevent a merger, or, in other words, in this case kept the 1914 and 1918 mortgages alive, subject always to any question of limitation. The truth, it seems to us, is that when the later mortgagee in this case the 1926 mortgagee comes to invoke the assistance of the earlier mortgage as a protection against the intermediate estate, he is really suing on the cause of action constituted by the earlier mort-

gage as well as on the cause of action constituted by the later one. It is for this very purpose that the cause of action on the earlier mortgage is kept alive. The point is well illustrated by the leading Calcutta case in 16 Cal. 523<sup>1</sup> which, both in the form in which the suit was brought (that is to say as a suit to realize the first mortgage as well as the later mortgage), and from the form of the relief given, which was on account of what was due on both the mortgages, makes it clear that it is the cause of action on the first mortgage—kept alive for the purpose—which alone is effective to give the owner of the puisne incumbrance priority over the intervening estate. This is, we think, equally the effect of the case in the Judicial Committee in 23 ALL. 313<sup>2</sup> when the facts of that case are correctly understood.

[13] In the suit before us the only cause of action actually pleaded by the plaintiffs is the cause of action on the 1926 mortgage, there being no mention in the plaint at all of the 1914 and 1918 mortgages. If the matter had rested there, we should have entertained some doubt whether the plaintiffs, at least without amendment, could have taken a decree in this suit, superseding a person deriving title under the 1919 mortgage, which in effect rested on a cause of action on the two mortgages of 1914 and 1918 which had never been pleaded. Against this, however, it is true that the person who now represents the estate in the part of the property comprised in the 1919 mortgage was made a party to the suit. We are told, though there is no evidence to that effect, that the portion of the property purchased by the appellant in the 1932 execution proceedings on the 1919 mortgage was sufficient to discharge the whole principal and interest then outstanding on that mortgage, and that accordingly there now exists no other intermediate interest than the estate of the appellant in the fourteen *sihams* which he bought in 1932. The appellant by his written statement in this suit did in fact raise, or at least, by common consent in the Court below, was treated as raising, the issue whether his interest in the mortgaged property was paramount to that of the plaintiffs, and in view of that circumstance we think it would be wrong now, whatever may be the right view as to the proper form of pleading, not to treat it as an issue in the suit. If, therefore, the plaintiffs are able to overcome the other obstacles in their way, they should, we think, have a declaration of their priority as against the appellant's estate in the property.

[14] This opens the way to the remaining issues in the suit, which are issues of limitation. The circumstance that it is the prior mortgage itself which alone gives to the later encumbrancer or purchaser his title to priority over any inter-



vening estate seems to lead logically to the conclusion that the later mortgagee or purchaser can only rely on the prior mortgage if, apart from S. 101, it was capable of being sued on at the date of the subsequent mortgage. As it has been put, the effect of the principle involved in S. 101 is to "keep alive" the prior incumbrance, and not to "give it a rebirth." Thus, a mortgage, which, at the date of the subsequent incumbrance, is already dead in the sense that, owing to the operation of the Limitation Act, it cannot be sued upon, will not be revived as a protection against an intermediate incumbrancer.

[15] Since this judgment was prepared, our attention has been called to a very recent decision by a Full Bench of five Judges of the Court in *[Munna Lal v. Chunni Lal]* which has so far been reported in 1945 A. L. J. 292.<sup>3</sup> We do not feel it to be either necessary or proper to discuss this decision, except to say that in our view it turned entirely upon the terms of S. 92, T. P. Act, 1882, and is to be taken as no authority either in a case under S. 101 of that Act or in a case involving a consideration of the effect of an acknowledgment so as to diminish the force of what was said by Sir Asutosh Mookerji in 1 C. L. J. 337<sup>4</sup> as subsequently approved in I.L.R. (1942) ALL. 660<sup>5</sup> by the Privy Council.

[16] In the present case the period of limitation against the 1914 mortgage would have expired on 12-6-1926; and, against the 1918 mortgage, on 27-5-1930. The 1926 mortgage was, therefore, executed before either of them had become time barred. The present suit was started on 4-7-1938 and would be within time, so far as any reliance on the 1914 and 1918 mortgages was concerned, only if a fresh starting point of limitation, for each of them was constituted by the execution of the 1926 mortgage. The question, therefore, which has next to be considered is whether the mortgage instrument of 1926 contained any acknowledgment within the meaning of S. 19, Limitation Act, 1908, and, if it did, whether such acknowledgment was effective as against the appellant's predecessors-in-title—the 1919 mortgagees—who were no parties to the 1926 mortgage. If the latter of these two questions is answered in the negative, then the former question does not arise.

[17] Looking at the language of S. 19, Limitation Act, 1908, an effective acknowledgment of liability in respect of any right for a suit on which a period of limitation is placed by the Act, may be given not only by the party against whom such right is claimed, but by the person "through whom he derives title or liability." The present case is a case in which the acknowledgment of 1926 was given long after the creation of the 1919 mortgage, and accordingly the ques-

tion arises whether the appellant as representing the 1919 mortgagees, can be bound by an acknowledgment, to which the 1919 mortgagees were no parties, given subsequently to the date on which they acquired their interest. This question was considered in 1905 by a Bench of the Calcutta High Court of which Sir Asutosh Mookerjee was a member in 1 C. L. J. 337<sup>4</sup> at pages 343-348. The learned Judge basing himself on the observations of Lord Westbury in (1863) 1 De. G. J. & S. 122,<sup>6</sup> held that an acknowledgment given by a mortgagor in favour of a prior mortgagee did not preclude an intermediate mortgagee, whose title accrued before the acknowledgment was given, from relying on the Limitation Act as a bar. Lord Westbury in dealing with a case under the Real Property Limitation Act, 1833, had said that the adoption of the view that an acknowledgment by a mortgagor in favour of a first mortgagee would operate against a second mortgagee whose title originated before the acknowledgment had been given would lead to very extraordinary and alarming consequences. He said:

"If it be well founded, then according to the true intent and meaning of this Statute, the right of one man may be taken away by the act of another. If the second mortgagee be in possession, and the first mortgagee seeks to recover his principal and arrears of interest for 20 years by a suit for foreclosure or sale, is the second mortgagee to be at liberty to plead or insist on this enactment? It is impossible to deny his right so to do. But according to this decision, if the first mortgagee obtains at any time the acknowledgment in writing of the mortgagor or his representative, the right of the second mortgagee is defeated, and all the arrears are recoverable against the second and subsequent mortgagees. That is to say, the mortgagor or his representative, who may have no interest whatever in the lands (for the ultimate equity of redemption may not be worth one shilling), shall be enabled to charge the estate anew with any amount of arrears of interest as against the second and subsequent mortgagees. The Court is bound by every principle of judicial interpretation to find, if possible, a construction of the statute which does not involve consequences so inconsistent with natural justice. . . ."

[18] With these observations in view, Sir Asutosh Mookerjee decided that S. 19, Limitation Act, should equally be construed so as not to involve a consequence inconsistent with natural justice, and it has to be remembered that a Court is bound to give a liberal construction to an Act curtailing rights. It is not, we think, necessary to follow the course of the many decisions in Indian Courts since 1905. But the Judicial Committee of the Privy Council in I.L.R. (1942) ALL. 660<sup>5</sup> on appeal from our own Court referred to the case before Sir Asutosh Mookerjee in terms which cannot amount to less than approval of the entire principle which he enunciated. It is true that in this case the fact was that the acknowledgment was given by a transferor who



at the date of the acknowledgment had no interest left in the property at all. But their Lordships, after referring to the observations of Lord Westbury in (1863) 1 De. G. J. & S. 122<sup>8</sup> said :

"This principle was applied to this very section by Mookerjee J., in 1 C. L. J. 337<sup>4</sup> and their Lordships are prepared to adopt the reasoning of that very learned Judge in the present case. . . ."

[19] In our view the principle enunciated by Sir Asutosh Mookerjee, to which the approval of the Privy Council was given in the case referred to above, applies no less to a case in which the mortgagor giving the acknowledgment has retained some scintilla of interest in the form of an equity of redemption than to a case in which he has parted with his interest altogether. The same view was taken very recently in a Full Bench case in the High Court at Nagpur in A.I.R. 1944 Nag. 163.<sup>7</sup> For these reasons, in our opinion, the appellant before us, in the absence of any other special circumstances, would not have been bound by any acknowledgment given by the 1926 mortgagees in the 1926 mortgage instrument.

[20] That would have concluded the matter, so far as priority was concerned, in favour of the appellant but for certain considerations with which it is now necessary to deal. In 1929, the 1919 mortgagees Gokul Chand and Kallu Mal, brought a suit on the 1919 mortgage. To this suit in the first place they made defendants not only the 1919 mortgagors but also the present plaintiffs. Unfortunately, we have before us only what appears to be an amended plaint. But it seems—and, indeed, no other alternative has been suggested to us—that the only capacity in which they could have made the 1926 mortgagees defendants to their suit was as mortgagees subsequent in priority to the 1919 mortgage. This was followed almost exactly a month later by an application made by the plaintiffs to the Court in which the suit was pending in the following terms :

"Sir,

In the above-mentioned case, it is submitted that defendants 3 and 4 had obtained a simple mortgage in lieu of the prior debt due to them. Therefore, they are prior mortgagees and it is not necessary that they should be made parties to the suit.

It is, therefore, prayed that their names may be removed from the array of the defendants and in the heading No. 3 may be substituted for No 5 and the names of defendants 3 and 4 with the serial number may be struck off.

Petitioner—Babu Ram Sarup Vakil for the plaintiffs.

"Signature of Gokulchand in Hindi, Signature of Kallumal, in Urdu Sd. Ram Saroop.

11-7-1929."

[21] On this application the Munsif made an order on the same day : "Amend and exempt as prayed for." In the judgment in the Court

below the learned Judge has said that this application on the part of the plaintiffs to the 1929 suit (the 1919 mortgagees) was prompted by the objection of the present plaintiffs "to the effect that they were prior mortgagees." We do not know on what material it was that the learned Judge in the Court below based this statement, but, in the absence of any suggestion that it is incorrect, we feel bound to assume its truth. On these facts the learned counsel for the present respondent-plaintiffs advances the argument that, whatever may have been the position of the appellant prior to 1929, he is now, in view of the acknowledgment contained in the foregoing application by his predecessors-in-title, in any event precluded from asserting any priority over the 1926 mortgagees in respect of the earlier mortgages. It is put in two ways. As we understand, it is first said that in the 1929 proceedings there was only one capacity in which the 1926 mortgagees could possibly have been made defendants in the first place and only one right that could possibly have been claimed against them. That capacity was as subsequent mortgagees; and the only right that could have been claimed against them was a right of priority. That being so, the acknowledgment contained in the application set out above (subject, of course, to its actual construction) was an acknowledgment that the 1926 mortgagees were entitled to the right of relying on the earlier mortgages as a protection against the 1919 mortgage. To put that in another way, a fresh starting point of limitation had arisen in favour of the 1926 mortgagees as between them and the 1914 and 1918 mortgagors by virtue of the acknowledgment contained in the mortgage instrument itself of 1926. This, however, as we have shown, did not bind the 1919 mortgagees in the matter of priority. But it is said that the 1919 mortgagees themselves supplied the acknowledgment necessary to start a fresh period of limitation in favour of the 1926 mortgagees as against them by the document of 11-7-1929, set out above. In this way, the result is said to follow that the present plaintiffs in their suit on the 1914 and 1918 mortgages are barred by limitation neither as against the 1914 and 1918 mortgagors nor in respect of their right of priority, as against the 1919 mortgagees. The second way in which the matter is put is that it is said that the acknowledgment contained in the document of 11-7-1929, filed by the predecessors-in-title of the present appellant in the 1929 proceedings constitutes an estoppel by which the appellant is now bound, against asserting any right of priority for his estate as against the present plaintiffs, the mortgagees under the 1926 mortgage.



[22] So far as any claim by the present plaintiffs for priority over the 1919 mortgage by virtue of the 1914 mortgage is concerned, there is an obvious fallacy in this view. The fallacy is that in 1929 the 1914 mortgage had, so far as the 1919 mortgagees were concerned, already become time barred. We have already held that the 1919 mortgagees were not bound by the acknowledgment of 1926 and accordingly in 1929 more than 12 years had elapsed. That being so, no acknowledgment given in 1929 could be relied on to support a right of priority derived through the 1914 mortgage. This, however, does not apply to the 1918 mortgage, since in 1929 the limitation period had not expired. It remains, therefore, to examine the effect of the document of 11-7-1929, so far as the 1918 mortgage is concerned. The 1919 mortgagees in their application to the Court "submitted" — we take that to be the equivalent of a statement — that the 1926 mortgagees had taken the 1926 mortgage "in lieu of a prior debt due to them." They then set out what was perhaps not a conclusion of fact, but was certainly a conclusion of law, viz., that the 1926 mortgagees were "prior mortgagees" to them. Now, it is clear that a document said to constitute an acknowledgment has to be construed in the context in which it is given and that, where its language is not clear in itself, the context may be examined to see what it is to which the words refer. That is not to say that any equivocation in an acknowledgment can be cured by ascertaining what the probable intention of the acknowledgor was. That is quite a different thing. But where, after examining in the light of the context what it was that the person giving the acknowledgment was actually referring to, the conclusion follows that it is an unequivocal acknowledgment of a right, then that acknowledgment is sufficient to satisfy s. 19, Limitation Act.

[23] In this case, we cannot doubt that, read in its context, the only things that the 1919 mortgagees can have been referring to when they spoke of the prior debts and the prior rights of the 1926 mortgagees were the debts and the rights under the 1914 and 1918 mortgages. We know that these documents and rights did exist and the appellant has not alleged that there were any other mortgages or rights which might lead to any equivocation in the acknowledgment. In our view, therefore, on its true construction the document of 11-7-1929, can only be taken as constituting an acknowledgment by the 1919 mortgagees both of the existence of the 1914 and 1918 mortgages and of their own "liability" in respect of the right of priority of those mortgages over them, which was the only right

which could have been asserted against them in the 1929 proceedings. In that view of the matter, we think, not without some reluctance, that the respondent-plaintiffs to this suit are right in saying that they had on 11-7-1929, an acknowledgment from the predecessors-in-title themselves of the present appellant of their liability to submit to the plaintiffs' right of priority under and by virtue of the 1918 mortgage. So far as the second contention by the plaintiff-respondents is concerned to the effect that the document of 11-7-1929, constituted an estoppel, apart altogether from an acknowledgment, we propose to deal with that shortly by saying that we have been unable to find any ground for supposing that what was said led to any alteration by the plaintiff-respondents in their position. We have difficulty, therefore, in following how it could have constituted an estoppel.

[24] In the result, therefore, we think that the defendant-appellant succeeds in the present suit in respect of the 1914 mortgage, but fails in respect of the 1918 mortgage. To recapitulate the steps by which this result has been arrived at, the plaintiffs, the mortgagees under the 1926 mortgage, were entitled, subject to any question of limitation, to rely on the 1914 and 1918 mortgages as a shield against the appellant's estate derived through the 1919 mortgagees. The 1919 mortgagees were not, in our judgment, bound by any acknowledgment given by the mortgagors of the 1914 and 1918 mortgages contained in the mortgage instrument of 1926, because that instrument came into being after their title had accrued and they were no parties to it. At that stage the appellant would, in our view, have succeeded in maintaining his priority as against the plaintiffs-respondents suing under the 1926 mortgage. Nevertheless we are compelled to the view that by the document of 11-7-1929, filed by the 1919 mortgagees in the 1929 proceedings they themselves supplied the acknowledgment of their own liability to concede priority to the present plaintiffs in respect of the 1918 mortgage, and by so doing started a fresh period of limitation from 11-7-1929, in favour of the present plaintiffs-respondents for the purpose of enabling them to assert their priority over the present appellant's estate.

[25] For these reasons we think that the result of this suit is that the plaintiffs-respondents are entitled to a preliminary mortgage decree in respect of the 1918 mortgage which has been kept alive in their favour. They are also entitled to a preliminary mortgage decree in respect of the 1926 mortgage, so far as the principal and interest secured by and the property comprised in it are not already covered by the 1918 mortgage. In the former preliminary



mortgage decree the plaintiffs-respondents will have a declaration of their priority over the estate of the appellant in the fourteen *sihams* which he acquired through the 1919 mortgagees in the year 1932. In all other respects, that is to say in respect of any part of the fourteen *sihams* vested in the appellant which are not comprised in the 1918 mortgage, notwithstanding that the same may be included in the 1926 mortgage, the present appellant is entitled to a declaration that he has priority to the 1926 mortgage. We, accordingly, allow the appeal to the foregoing extent. We think that the proper order for costs will be that each party should bear their own throughout.

V.R./D.H.

*Appeal partly allowed.***A. I. R. (34) 1947 Allahabad 81 [C. N. 41]**

MATHUR J.

*Gauri Shanker — Plaintiff-Appellant v. District Board of Farrukhabad—Defendant-Respondent.*

Second Appeal No. 2589 of 1944, De'd on 15-3-1946, from order of Dist. Judge, Farrukhabad, D/- 7-8-1944.

(a) U. P. District Boards Act (10 [X] of 1922), S. 192 — Suit for perpetual injunction against District Board — Notice under S. 192 is not necessary.

Notice under S. 192 to the District Board is not necessary for a suit against the Board for perpetual injunction restraining it from closing down the plaintiff's brick kiln and demolishing it as the object of the suit would be defeated by giving of a notice and waiting for two months. [Para 2]

(b) U. P. District Boards Act (10 [X] of 1922), S. 181—Order under, by Board asking plaintiff not to work his kiln — Criminal prosecution for disobedience of order — Suit by plaintiff for perpetual injunction restraining Board from closing his kiln — Jurisdiction of civil Court to entertain suit is barred by S. 56 (a) and (e), Specific Relief Act — Specific Relief Act (1877), S. 56 (a) and (e).

Under the bye-laws of the District Board no person was allowed to construct and burn a brick kiln within 300 feet from a public road. The plaintiff's kiln being within 300 feet from a public road the Board issued an order under S. 181 asking the plaintiff to close down and not to burn the kiln by 15th March 1942. As the order was not obeyed, the Board launched a criminal prosecution against the plaintiff to make him obey the notice by imposition of recurring fine. The plaintiff then brought a suit on 25th July 1942 for a perpetual injunction restraining the Board from closing his kiln or in any way interfering with his working of the same. The question was whether the Civil Court could restrain the Board from pursuing the prosecution:

*Held* that it would be for the criminal Court to say whether the prosecution could be sustained or not. The Civil Court could not go into that question. Section 56 (a) and (e) specifically barred the jurisdiction of the civil Court to entertain the suit. [Para 4]

(c) U. P. District Boards Act (10 [X] of 1922), S. 192—Order by Board under S. 181 asking plaintiff to close down his kiln by 15th March 1942 — Suit by plaintiff on 25th July 1942 for injunction restraining Board from closing his kiln is within time.

In April 1941 the District Board issued an order under S. 181 of the Act asking the plaintiff to close down his brick kiln by the 15th March 1942 as it contravened the bye-law which prohibited the construction of brick kilns within 300 feet from a public road. The plaintiff brought a suit on 25th July 1942 for a perpetual injunction restraining the Board from closing his kiln :

*Held* that the suit was not barred by time as it was brought within six months from the 15th March 1942.

[Para 2]

*R. C. Ghatak and B. R. Avasthi — for Appellant.*

*Brijlal Gupta — for Respondent.*

**Judgment.**—This is a plaintiff's second appeal and it arises under the following circumstances :

It appears that the plaintiff was running a kiln somewhere near Mauza Mahrauli in the district of Farrukhabad for about 35 years before the institution of the suit and was using it for burning bricks. In the year 1935, the District Board of Farrukhabad framed certain bye-laws restricting the construction and burning of the kilns within the jurisdiction of the Board. One of the bye-laws which is applicable to the facts of this case was

"no person shall be allowed to construct and burn such kilns or make excavation within a distance of 300 feet from a public road."

It is not disputed that this brick kiln was within a distance of 300 feet from a public road. The plaintiff obtained a license for the working of this kiln up to the year 1941, but in April 1941, the District Board called upon the appellant to close the kiln by the 15th of March 1942. It is in evidence that subsequent to this notice a prosecution was launched by the District Board.

[2] On 25th of July 1942, the suit out of which this appeal arises was brought by the plaintiff appellant praying that the defendant be restrained by a perpetual injunction from closing the Bhatta of the plaintiff, or in any way interfering with the plaintiff's carrying on of his legitimate trade of Bhatta on the site in dispute. The defence was that the civil Court had no jurisdiction to entertain the suit, that the suit was barred by S. 192, clause (3) of the District Boards Act, and that it was also defective because no notice under S. 192 was served on the Board. The learned Munsif who tried the suit dismissed the claim and that order was confirmed by the learned District Judge. The findings of the learned District Judge are that the suit was barred by time and that as no notice was given as required under S. 192 of the District Boards Act the suit was liable to be thrown out. The learned District Judge however held that the Board was not competent to serve the plaintiff with a notice, but he dismissed the suit on the legal grounds. I have heard the learned counsel for the parties and in my opinion, this appeal must fail, although I do not agree with



all the reasons given by the learned Judge. I am satisfied that according to the recital given in the plaint the suit was not barred by time. The plaintiff has stated that a notice was served on him and he was asked to close the Bhatta by the 15th of July (March?) 1942. The suit having been brought on 25-7-1942, was well within six months from that date. I also do not agree with the learned Judge that in a suit for injunction a notice is necessary. If the allegations were true that the Board was going to close the Bhatta and to demolish it, I think the object of the suit would certainly have been defeated by giving of a notice and waiting for two months.

[3] But having said all that I think that the suit was certainly misconceived. Under S. 181, District Boards Act the District Board is entitled to serve a person with a notice requiring him to execute a work in respect of any property movable, or immovable public or private, or to provide or do or refrain from doing anything within the time specified in the notice. Under the same section, if the person fails to comply in executing the work or providing or doing anything, the Board could cause such work to be executed or such thing to be provided or done and to recover the expenses from that person. But in the case of a negative order asking him to refrain from doing anything as the case here appears to be, the Board could only launch a prosecution against that person. I do not think it was ever the intention of the Board to demolish and to remove the kiln bodily and physically. They only issued an order asking the plaintiff not to work the kiln and that order could only be enforced by launching a prosecution and forcing the will of the plaintiff by a recurring fine. This was the course obviously adopted by the Board when they launched the prosecution.

[4] The question then arises whether it is open to the civil Court to prevent a lawfully constituted body from pursuing a prosecution. It will be for the criminal Courts to say whether the prosecution could be sustained or not. I do not think a civil Court can go into that question. In this view of the matter the plaintiff was not entitled to succeed. Under S. 56 clauses (a) and (e) of the Specific Relief Act it is provided :

"An injunction cannot be granted—

(a) to stay a judicial proceeding at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings.

(e) to stay proceedings in any criminal matter."

This specifically bars the jurisdiction of a civil Court. In this view of the matter the suit was rightly dismissed. The appeal fails and is dismissed with costs. Leave to appeal under the Letters Patent is refused.

G.N.

*Appeal dismissed.*

A. I. R. (34) 1947 Allahabad 82 [C. N. 42]

MALIK J.

*Cawnpore Municipal Board—Plaintiff—Appellant v. Pt. Tirjugi Narain—Defendant—Respondent.*

Second Appeal No. 1503 of 1945, De'd on 1-5-1946, from order of Civil Judge, Cawnpore, D/- 6-12-1944.

U. P. Municipalities Act (2 [II] of 1916), S. 149—Owner of land is not assessed to house-tax and water rate especially when he has let it out to others on building lease—Owner of building on land leased is liable.

Section 149 and other sections of the Act make it clear that it is not the owner of the land who is assessed to house-tax and water rate, especially when he has let out the land to other people on building lease. When the owner of the land leases it out to others for building purposes it is the owner of the buildings on the land and not the owner of the land who is liable for house-tax and water rate. Apart from the provisions of S. 149 unless the Municipalities Act made a special provisions for taxing the owner of the land, the house-tax and the water rate which are primarily intended for building should be levied only on the owner of the building. [Para 2]

S. N. Verma — for Appellant.

S. N. Sen and H. P. Sen — for Respondent.

**Judgment.**—This is a plaintiff's appeal. The plaintiff is the Municipal Board of Cawnpore. There is a plot of land No. 4/200, the major portion of which is within the Municipal limits of Cawnpore. The plot belonged to one Ram Sewak who died on 24-5-1936, and the name of the defendant Tirjugi Narain, his son, was substituted in the Municipal records on 8-1-1942. Ram Sewak had demarcated the plot into various small building plots and gave them to various persons on building lease. The Municipal Board in the year 1938 assessed Ram Sewak to house-tax and water rate calculating the value of the income of the houses as one unit and imposed a tax of Rs. 17/4 as house-tax and Rs. 34-8-0 as water rate. In April 1943 the house-tax was enhanced to Rs. 29-10-0 and the water rate to Rs. 59-4-0. No notice of this enhancement was given to Tirjugi Narain defendant and the Municipal Board in spite of the fact that the name of Tirjugi Narain was on its records, proceeded against Ram Sewak, who had died seven years previous to that.

[2] Learned counsel appearing for the Board admits that if the various occupiers are separately taxed, the Board would not be entitled to levy any tax, the income from each of the houses being less than Rs. 6. To avoid that position the Board has fallen upon this ingenious plan of taxing the owner of the land and pooling the income of all the houses together as one unit. To my mind, the various sections of the Municipalities Act make it perfectly clear that it is not the owner of the land who is assessed to house-tax and water rate, specially if he has



let out the land to other people on building lease. Section 149, Municipalities Act, lays down that except when otherwise provided by rule every tax other than a scavenging tax or tax for the cleansing of latrines and privies on the annual value of buildings or lands or of both shall be leviable primarily from the actual occupier of the property upon which the said taxes are assessed. Apart from the provisions of S. 149, on general principles of law, I am inclined to hold that unless the Municipalities Act made a special provision for taxing the owner of the land, the house-tax and water rate, which are primarily intended to be imposed for building, should be levied only against the owner of the building.

[3] If the contention advanced on behalf of the Municipal Board be accepted, then in a place like Allahabad where most of the houses are built on land belonging to the Government, it would be the Government which would have to pay house-tax and water rate on the total income of the houses owned and possessed by various occupiers and lessees. Learned counsel has submitted that this is a test case filed on behalf of the Municipal Board. If I had any doubts on the point I would have given him leave to file an appeal under the Letters Patent, but there is, to my mind, absolutely no force in the contention advanced by learned counsel, nor has been able to show any section or any rule of law which would justify the Municipal Board in imposing a tax of the nature imposed by the Board against Ram Sewak in 1938 and 1943. As regards the jurisdiction of the civil Court, the matter is concluded by various authorities which have been cited in the judgment under appeal. There is no force in this appeal and I dismiss it with costs. Leave to file an appeal under the Letters Patent is refused.

G.N.

*Appeal dismissed.***A. I. R. (34) 1947 Allahabad 83 [C. N. 43]**IQBAL AHMAD C. J. AND  
BIND BASNI PRASAD J.*Ram Nath — Appellant v. Deokinandan Krishna and others — Respondents.*

Ex. First Appeal No. 299 of 1942, De'd on 3-5-1946, from order of Civil Judge, Muzaffarnagar, D/-3-7-1942.

Limitation Act (1908), Art. 181 — Preliminary decree for sale on 29-3-1933 and final decree on 20-11-1933 — In appeal by defendant from preliminary decree appellate Court directing fresh preliminary decree to be drawn up — Execution application filed on 23-1-1941 dismissed on 22-5-1941 — No fresh final decree drawn up — Second application on 9-9-1941 — Application by decree holder on 24-1-1942 requesting final decree of 20-11-1933 to be brought in accordance with preliminary decree of appellate Court — Application held barred under Art. 181, Limitation Act — In the

absence of proper final decree execution of decree on application dated 9-9-1941 held could not take place — Civil P. C. (1908), O. 34, R. 5.

No application for execution of any decree can be entertained unless an executable decree exists. A preliminary decree for sale cannot be executed. [Para 6]

After the decree-holder had obtained a preliminary decree for sale on 29-3-1933 and a final decree for sale on 20-11-1933 the defendant preferred an appeal from the preliminary decree. The appellate Court modified the decree of the lower Court on 5-4-1938 and directed that a fresh preliminary decree should be prepared. On 23-1-1941 the decree-holder applied for execution of the decree but the same was dismissed for default on 22-5-1941. On 9-9-1941 he made second application for execution. In this application the amount due was calculated on the basis of the preliminary decree of the appellate Court. But there was no prayer in this application for the preparation of final decree in conformity with the preliminary decree passed by the appellate Court. However on 24-1-1942 he made an application requesting that the final decree dated 20-11-1933 might be amended so as to bring it in accord with that preliminary decree.

*Held*, (1) that an application for the execution of a decree is an application in execution whereas an application for the preparation of a final decree is an application in a suit. An application made in execution could not be treated as one in a suit: 29 A. I. R. 1942 Pat. 343, *Not approved*. [Para 6]

(2) that on the preliminary decree of the trial Court being varied by the appellate Court, the final decree dated 20-11-1933 fell to the ground and it could not be executed until it was made consistent with the preliminary decree of the appellate Court or a fresh final decree was prepared accordingly. [Para 6]

(3) that the application dated 24-1-1942 for preparation of the final decree in accordance with the preliminary decree of the appellate Court was time-barred under Art. 181, Limitation Act and no execution of the decree could take place on the application of 9-9-1941 as no final decree in accordance with the preliminary decree of the appellate Court existed on that date. [Paras 5, 8]

Civil P. C.—('44-Com) O. 34, R. 5, N. 10.

Limitation Act—('42-Com) Art. 181, N. 4.

*R. B. Jaini* — for Appellant.*K. C. Mital* — for Respondents.*Case referred* : —1. ('42) 29 A. I. R. 1942 Pat. 343 : 199 I. C. 470, *Bashisht Narain Singh v. Ram Pukar Singh*.

**Bind Basni Prasad J.** — This is an appeal from an order passed by the learned Civil Judge of Muzaffarnagar allowing the objection of the judgment-debtor and dismissing an application for the execution of the decree and an application for the preparation of a final decree for sale under O. 34, R. 5, Civil P. C. The material facts are as follows :

[2] On 29th March 1933, the decree-holder obtained a preliminary decree for sale under O. 34, R. 4, Civil P. C. from the Court of Civil Judge. On 20th November 1933, he obtained a final decree for sale under O. 34, R. 5, Civil P. C. from the same Court. In December 1933, the judgment-debtor preferred an appeal to this Court against the aforesaid preliminary



decree. The appeal was decided by this Court on 5th April 1938. The decree of the lower Court was modified. A decree for sale was granted for a sum of Rs. 2,500 principal and Rs. 7,074-5-9 interest. By the same decree a simple money decree was also granted for a sum of Rs. 2,500. It was directed by this Court that a fresh preliminary decree under O. 34, R. 4, Civil P. C. should be prepared. A decree was accordingly prepared in this Court. The usual six months' time upto 5th October 1938, was given for the payment of the amount found due. On 23rd January 1941, the decree-holder applied for the execution of the decree. That execution application was dismissed for default on 22nd May 1941. On 9th September 1941, another application for execution of the decree was made by the decree-holder. It is this application which is the subject of this appeal and it requires examination in detail. It may be noted that up to this stage of the proceedings the decree-holder did not make any formal application either for the amendment of the final decree dated 20th November 1933, so as to bring it in conformity with the decree of this Court, or for the preparation of a fresh final decree.

[3] The application dated 9th September 1941, is in the usual form prescribed by O. 21, R. 11, Civil P. C. In the first column the numbers of the original suit and of the first appeal to this Court are given. In the third column the dates of the preliminary and final decrees passed by the trial Court and of the appellate decree of this Court are given. In column 7 of the amount due, viz. Rs. 9,574-5-9 as entered in the preliminary decree of this Court and Rs. 1,962-9-3 on account of interest from the date of the decree of this Court to the date of the execution application, is given. The total amount claimed was Rs. 11,536-15-0. It may be mentioned here that the simple money portion of the decree passed by this Court was not sought to be executed by this application. In column 10 which is the column for stating as to the mode in which the decree is sought to be executed, the decree-holder requested that the decree should be realized by the sale of the hypothecated property. There was no prayer at all in this application that any final decree under O. 34, R. 5, Civil P. C., in conformity with the decree passed by this Court should be prepared.

[4] On 24th January 1942, the decree-holder made another application supported by an affidavit. Therein it was stated that in the execution application dated 9th September 1941, the amount decreed by this Court had been given and it was thought that that was sufficient and there was no need for any formal application for the preparation of a final decree, but later on the

decree-holder was advised that an express prayer should be made for the drawing up of a final decree. Hence by the application dated 24th January 1942, it was requested that the final decree dated 20th November 1933, might be amended so as to bring it in accord with the preliminary decree passed by this Court.

[5] It is obvious that the application dated 24th January 1942, for the preparation of the final decree in accordance with the decree of this Court was beyond three years and was clearly barred by Art. 181, Limitation Act, 1908. The lower Court held that the execution application dated 9th September 1941, could not be proceeded with, as no final decree existed and the application dated 24th January 1942, for the final decree being time-barred could not be granted. In the result the execution application and the application dated 24th January 1942, were dismissed and from that order the decree-holder comes in appeal.

[6] It is obvious that no application for the execution of any decree can be entertained unless the executable decree exists. Now, on 9th September 1941, no final decree on the basis of the preliminary decree of this Court existed and the request of the decree-holder to execute the decree for the amount allowed by this Court on 5th April 1938, was premature. No preliminary decree for sale can be executed. It has been argued on behalf of the appellant that notwithstanding the fact that there was no express request in this execution application for the preparation of a final decree, it should be treated as one containing a request to that effect and in this connection reliance is placed on A.I.R. 1942 Pat. 343.<sup>1</sup> With great respect, we do not agree with the principle laid down in that ruling. An application for the execution of a decree is an application in execution, whereas an application for the preparation of a final decree is an application in a suit. We find it difficult to treat an application made in execution as one made in a suit. Order 34, Rule 5 (3), Civil P. C., 1908, provides that there should be an application for final decree by the plaintiff. The words "in this behalf" in that rule are important and significant. There was no such application by the decree-holder within three years of the preliminary decree passed by this Court. When the preliminary decree passed by the trial Court was varied by this Court, the final decree dated 20th November 1933, fell to the ground and it could not be executed until it was made consistent with the preliminary decree awarded by this Court, or a fresh final decree was prepared accordingly. A perusal of the execution application dated 9th September 1941, and the preliminary decree passed by this Court will



show that the decree-holder sought to execute the preliminary decree, a decree which is incapable of execution.

[7] The decree-holder's own conduct shows that he had not intended to treat the application in execution dated 9th September 1941, as one for the preparation of the final decree. What was the need of the second application dated 24th January 1942, if the application dated 9th September 1941, was sufficient for the preparation of a final decree under O. 34, R. 5, Civil P. C.?

[8] We are of opinion that the view taken by the lower Court is correct, that the application dated 24th January 1942, for the preparation of the final decree is time-barred and that no execution of the decree can take place on the application dated 9th September 1941, as no final decree in accordance with the preliminary decree of this Court existed on that date. The appeal is dismissed. But in the circumstances of the case the parties shall bear their costs.

N.S.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 85 [C. N. 44]**

ALLSOP J.

*Abdul Rahman v. Mohd. Ismail.*

Second Appeal No. 43 of 1945, De'd on 22-8-1946, from decree of Court of Civil Judge, Benares, D/- 30th October 1944.

Muhammadan law—Pre-emption—Right to pre-empt depends upon right of way or right to discharge water—Existence of latter right in India depends upon Easements Act—Mere isolated user not sufficient—There must be reasonable period of prescription.

The Muhammadan law of pre-emption is that a person who has a right of way over or a right to discharge water upon certain property has a right to pre-empt that property, but the right to pre-empt depends upon the right of way or the right to discharge water and in India the existence of that right depends on the Easements Act. A right of easement under the Muhammadan law cannot, in any case, come into existence on mere isolated user. There must be some reasonable period of prescription: 31 All. 519, *Doubted*. [Para 4]

*G. S. Pathak and M. N. Raina* — for Appellant.

*Mushtaq Ahmad and Krishna Shankar* —

for Respondents.

*Case referred :—*

1. ('09) 31 All. 519: 2 I. C. 458, *Baldeo v. Badri Nath*.

**Judgment.**—This second appeal arises out of a suit for pre-emption based on the ground that a custom of pre-emption according to the rules of Muhammadan law prevails in the locality in which the property sold is situate. The plaintiff for the purposes of this appeal may be said to have claimed a right to pre-empt upon the ground that he had a right of way over the property sold and a right to discharge water upon or through such property. The plaintiff's house adjoins the house of the vendor. In order to defeat the right of pre-emption the vendor left a strip of his house adjoining the plaintiff's house

unsold and sold a part of his house which was separated from the plaintiff's house by this strip.

[2] In so far as the right of way is concerned, it appears that the plaintiff was the usufructuary mortgagee of the house sold and while he was in possession in his capacity as a mortgagee he opened a door from his own house into the house which is in dispute. The learned Judge has found that there was no right of way through this house. There was nothing to show as a fact that the opening of the door into the premises of which a part has been sold was acquiesced in by the vendor and I have no doubt that it cannot possibly be said that there was any right of way through that part of the house which has been sold.

[3] As to the other right of discharging water, it is perfectly clear that the allegation is that the water was discharged into that part of the house which was not sold. It seems to me that that is sufficient answer to the plaintiff's suit which has been dismissed by the learned Judge of the lower appellate Court. Even if we accept the proposition that the plaintiff has a right to discharge water from the roof of his house into the unsold portion, that does not seem to me to give him any right of easement over the unsold portion. Once the water has left his premises and gone on to the premises of another his right is satisfied. It is no concern of his what happens to the water after that i. e., whether it passes through the property which has now been sold or is retained on the unsold portion or is disposed of in some other way, provided he himself does not suffer by the water returning to his property or doing him any damage.

[4] Learned counsel for the appellant has based his argument really upon the point that there is no fixed period of prescription under the Muhammadan law for the acquiring of an easement. In the view that I take this question seems to me somewhat irrelevant, but I may, with the greatest deference to the learned Judges who decided the case of 31 ALL. 519<sup>1</sup> express my doubt whether the question of easement depends upon the rules of Muhammadan law. The Muhammadan law of pre-emption is that a person who has a right of way over or a right to discharge water upon certain property has a right to pre-empt that property, but the right to pre-empt depends upon the right of way or the right to discharge water and in India the existence of that right depends on the Indian Easements Act. It is obvious that the Muhammadan lawyers allowed a person to exercise the right of pre-emption because he had a right of way or a right to discharge water and not because he had been in the habit of passing over somebody else's property or discharging



water upon it. He would obviously have no preferential right to pre-emption if he could not enforce the right to go over the property or discharge water upon it. However, that may be, it seems to me that there can be no doubt that a right of easement under the Muhammadan law cannot in any case come into existence on mere isolated user. There must be some reasonable period of prescription and in so far as the right of way is concerned the learned Judge has decided, I think, rightly that no right of way of that kind has been established.

[5] On the other question of the right of discharging water, I do not think it was even properly alleged that there was any right over the property, which has been transferred by the vendor and which the plaintiff seeks to pre-empt. The result is that the appeal fails and is hereby dismissed with costs.

Leave to appeal is refused.

D.H.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 86 [C. N. 45]**  
PATHAK J.

*Bashir Ahmad v. Chandu Lal.*

Second Appeal No. 197 of 1945, Decided on 31-1-1946, from decision of Judge, Sm. C. C. Meerut, D/- 25-10-1944.

(a) Civil P. C. (1908), S. 100 — Question of fact — Finding of fact of lower Court not vitiated by error of law — Question cannot be entertained in second appeal.

When a question is essentially a question of fact it is not open to the High Court to entertain it in second appeal unless the finding arrived at by the lower appellate Court on the question is vitiated by any error of law. [Para 7]

C. P. C. —

('44) Com., S. 100, N. 53, Pt. 1.

(b) Easements Act (1882), S. 28 — Owner of dominant tenement acquiring right of way over servient tenement by prescription — Extent of right must be measured by extent of enjoyment — Use must be reasonable use for purposes of land in condition in which it was when user took place.

Where a person acquires an easement by prescription in accordance with S. 15, the extent of the right of easement has to be determined in accordance with S. 28. In the case of a right of easement acquired by prescription, the evidence regarding the probable intention of the parties and the purpose for which the right was acquired would be afforded by the accustomed user. The extent of the right must be measured by the extent of the enjoyment proved in any particular case. It cannot be contended that if it is proved that the owner of a dominant tenement has a right of way over a servient tenement, there would be a presumption that that right is unlimited in its character so that the way can be used for all purposes and at all times. The use must be the reasonable use for the purposes of the land in the condition in which it was while the user took place and any expansion of the user or the purposes for which the way may have been used is not permissible: (1876) 1 Ch. D. 362; 7 A. I. R. 1920 Bom. 233 and 19 I. C. 984 (All.), *Rel. on*; 13 Cal. 136 (P.C.), *Disting.* [Paras 9, 10]

*Mushtaq Ahmad* — for Appellants.

*Shambhu Prasad* — for Respondent.

*Cases referred :—*

1. (1876) 1 Ch. D. 362 : 45 L. J. Ch. 353 : 33 L. T. 679: 24 W. R. 466, Wimbledon and Putney Common Conservatorys v. Dixon.
2. ('21) 59 I. C. 426 : 7 A. I. R. 1920 Bom. 233, Chintamani Hargovan v. Ratanji Bhimbhai.
3. ('13) 19 I. C. 984 (All.), Jamna Prasad v. Gopinath.
4. ('86) 13 Cal. 136 : 13 I. A. 77 : 4 Sar. 713 (P. C.), Jadulal Mullick v. Gopalchandra Mukerji.

**Judgment.** — The defendants are the appellants in this appeal. The parties to this litigation own contiguous shops in the town of the Ghaziabad. The plaintiff's shop is situate towards the north of the defendant's shop. One part of the defendants' shop consists of a thatched roof which is separated from the plaintiff's shop by an intervening wall marked 'AA' in the plan attached to the plaint. At this stage, it is necessary to mention that there was once before litigation between the parties in which the defendants to the present suit figured as plaintiffs and the plaintiff to the present suit figured as defendant. In that litigation it was decided that the wall 'AA' was owned by the defendants to the present suit who had a right to pass through the door in that wall on to the land belonging to the plaintiff of the present suit and thence from over the staircase of the plaintiff in order to reach the roof of the defendants' shop. The width of this passage was declared to be two feet nine inches.

[2] It appears that prior to the institution of the suit, the defendants expressed an intention to construct a second storey over their shop and to build a *pucca* verandah in place of the thatched roof. The case of the plaintiff, the respondent to the present appeal, was that the wall 'AA' was exclusively owned by him and in any event, was the joint property of the parties. His case further was that the door in the wall 'AA' had been newly opened by the defendants and the latter have had no right of easement of way through the door and the plaintiff's staircase and that, in any event, the user by the defendants of the passage for the purposes of the second storey in the shop belonging to the defendants would result in an increase of burden on the servient tenement. There was one more plea in the averments of the plaintiff which was concerned with the right of flow of water from the plaintiff's roof over the defendants' roof, but it is not necessary to discuss that matter for the purposes of this appeal. Upon these allegations, the plaintiff prayed for a permanent injunction restraining the defendants from making any alteration in the wall 'AA' and from interfering with the plaintiff's possession over it. He also claimed a permanent injunction restraining the defendants from creating any right of way through the plaintiff's shop and staircase into the



second storey of the defendants and from obstructing flow of the water from the plaintiff's roof.

[3] In defence, the defendants contended that they were the owners of the wall 'AA' and that the door in that wall was old. The defendants further stated that they had a right of passage over the land belonging to the plaintiff through the plaintiff's shop and staircase and that this right had been determined in the previous suit mentioned above. The defendants denied that by an addition of the second storey over their shop any additional burden would be cast upon the servient tenement.

[4] The Court of first instance came to the conclusion that the defendants were the exclusive owners of the wall 'AA' and that the door in question was old. It held that the defendants had acquired, by prescription, an easement of right of way through the plaintiff's shop and staircase over a width of two feet nine inches and that the proposed constructions in the second storey of the defendant's shop would not result in an increase of burden on the servient tenement. In the result, the trial Court dismissed the suit. From this decree, the plaintiff appealed.

[5] The lower appellate Court confirmed the findings of the Court of first instance on all the points except one. This point related to the question as to whether by the proposed constructions in the second storey of the defendant's house there would be an increase in the burden of the easement on the plaintiff's property. Upon this point, the lower appellate Court took the view that the contemplated constructions would result in an increase of burden on the servient tenement and granted a decree for injunction in favour of the plaintiff in the following terms:

"A decree for injunction restraining the defendants from throwing any additional burden over the servient tenement and from enlarging the use to which the passage through the plaintiff's shop and staircase as enunciated in previous suit No. 1582 of 1927 of the Court of the Munsif of Ghaziabad was subjected."

[6] Aggrieved by this decree, the defendants have come up in appeal to this Court.

[7] Two questions are raised in this appeal. The first is whether the defendants had an unlimited right to the user of the passage through the plaintiff's shop and staircase and if not, what was the extent of that right. The second question, the solution of which depends, to a very great extent, upon the answer to the first question, is whether the proposed changes in the dominant tenement would involve an increase in the burden of servient tenement. Both these questions are essentially questions of fact and it is not open to me to entertain them in second appeal unless the findings arrived at by the lower appellate Court on these questions are vitiated by any error of law. Upon both the

questions, the lower appellate Court, in a careful judgment has held adversely to the plaintiff. In order to examine whether any error of law has been committed by the lower appellate Court in reaching its conclusions, it is necessary to state the law upon the point. But before I do so I pause to state in a little detail the conclusions of fact reached by the lower appellate Court. They are as follows :

[8] The roof of the defendants' shop is an open roof and the only construction on that roof has been a privy which has been in the use of the tenants of the shop. The proposed buildings in the second storey are intended to be let out for residential purposes to tenants. The user of the passage has been occasional, namely, at the time when any person occupying the defendants' shop as a tenant had occasion to use the privy or the open roof for sleeping purposes in summer. The user of the passage by the defendants after the construction of the second storey in their shop would be at variance with the original object of the easement and would amount to an extension of the right of easement beyond the purpose for which it was acquired, with the result that there would be a consequent increase in the burden on the servient tenement.

[9] There is no dispute about the nature of the easement in this case and there can be no question that the defendants acquired the easement by prescription in accordance with S. 15, Easements Act. The extent of the right of easement has to be determined in accordance with S. 28 of that Act. That section, so far as it is relevant, runs thus :

"An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.

The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired.

In the absence of evidence as to such intention and purpose . . .

(a) right of way of any kind does not include a right of way of any other kind."

[10] In the case of a right of easement acquired by prescription, the evidence regarding the probable intention of the parties and the purpose for which the right was acquired would be afforded by the accustomed user. The extent of the right must be measured by the extent of the enjoyment proved in any particular case. It has been contended before me that if it is proved that the owner of a dominant tenement has a right of way over a servient tenement there would be a presumption that that right is unlimited in its character so that the way can be used for all purposes and at all times. This proposition is not supported by any authority and runs counter to a current of decisions. The leading case upon the point is that in (1876) 1



Ch. D. 362,<sup>1</sup> which has been referred to by the lower appellate Court. In the judgment of James, L. J., at p. 368 occurs this passage :

"I am satisfied that the true principle is the principle laid down in these cases, that you cannot from evidence of user of a privilege connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever form or for whatever purpose that property may be changed, that is to say, if a right of way to a field be proved by evidence of user, however general, for whatever purpose, *qua* field, the person who is the owner of that field cannot from that say, I have a right to turn that field into a manufactory, or into a town, and then use the way for the purposes of the manufactory or town so built."

Reference may also be made to the case in 59 I. C. 426.<sup>2</sup> In that case, the contention that a person who has got a right to use a way for himself and his servants could extend the same to include a right of passage for sweepers carrying night-soil was not accepted. In that case, as in the present case, a right of way was fixed by a decree in an earlier litigation and the learned Judges held that by that decree, it was never intended by the Court to hold that the claimants to the right of way had acquired over the ground a right of way for sweepers also. Macleod C. J., took the view that the decree in the earlier litigation upholding a claim to a right of way must be strictly construed according to the facts of the case, and to hold now that the right of way could be extended to include a right of passage for sweepers would be going further than the decree intended. In the present case, the decree in the earlier litigation must upon the principle of this ruling be confined to the facts and the circumstances which existed at the relevant time in that case and, in my judgment, the argument that the right of way determined by that decree should be treated as unlimited in its character is erroneous. In this Court a similar question arose before Rafique J., in 19 I. C. 984.<sup>3</sup> It was held in that case that the back door of a house occasionally used by ladies or sweepers could not be converted into a main door for males. Learned counsel for the appellants has relied upon the Privy Council case reported in 13 Cal. 136.<sup>4</sup> In my opinion, that case is distinguishable from the facts of the present case. Upon the facts proved in that case, their Lordships inferred that there was no limit to the user of the passage. That case, which did not arise under the Easements Act, was decided on special facts. The principle deducible from the case law is that the use must be the reasonable use for the purposes of the land in the condition in which it was while the user took place and that any expansion of the user or the purposes for which the way may have been used is not permissible.

[11] I have examined the findings of the lower appellate Court in the light of the law as ex-

plained in the decided cases and I am of opinion that the findings arrived at by the lower appellate Court are not vitiated and for the reasons stated above, I dismiss this appeal with costs.

D.H.

*Appeal dismissed.*

### A. I. R. (34) 1947 Allahabad 88 [C. N. 46]

ALLSOP AG. C. J. AND MATHUR J.

*Babu Khan and others — Plaintiffs — Appellants v. Hukum Singh and another — Defendants — Respondents.*

Letters Patent Appeal No. 19 of 1945, Decided on 2-4-1946, from decision of Bennett J., in S. A. No. 1752 of 1942, D/- 5-1-1945.

Civil P. C. (1908), S. 11, Expl. VI — Representative suits—Suit by lambardar of Mahal against defendant under S. 245, U. P. Tenancy Act (17 [XVII] of 1939)—Suit referred to arbitration and decided — Subsequent suit by cosharers on same cause of action held barred.

A lambardar of a mahal had brought a suit against the defendant for demolition of certain constructions. The dispute was referred to arbitration and it was decided that the defendant might remain in possession on payment of a certain sum. Subsequently some of the cosharers brought a suit on the same cause of action :

*Held* that the lambardar was entitled to sue for ejectment under the provisions of S. 245, U. P. Tenancy Act, 1939. Once he was entitled to represent the cosharers in the matter, the decision in the previous suit was binding upon them in the present suit even though the previous decision was the result of an award by arbitrators. [Para 1]

C. P. C. ('44-Com) S. 11, Note 59.

C. S. Saran and Majid-uddin — for Appellants.

B. R. Avasthi — for Respondents.

**Allsop Ag. C. J.** — This is a Letters Patent Appeal against the judgment of a learned Single Judge of this Court. The plaintiffs were some of the zamindars in a mahal and sued the defendants for the demolition of certain constructions. The lambardar of the mahal had brought a previous suit on the same cause of action in the year 1939. The dispute had been referred to arbitration and it had been decided that the defendants might remain in possession on payment of a sum of Rs. 150, which amount was paid. It has been held by the learned Single Judge that the decision in the previous suit was binding upon the present plaintiffs. In our judgment, this decision is right. The lambardar was entitled to sue for ejectment under the provisions of S. 245, U. P. Tenancy Act, 1939. Once he was entitled to represent the cosharers in this matter, the decision in the suit was binding upon them even though it was the result of an award by arbitrators. We think there is no force in this appeal and we dismiss it with costs.

D.H.

*Appeal dismissed.*



\*A. I. R. (34) 1947 Allahabad 89 [C. N. 47]

VERMA AND MATHUR JJ.

*Mt. Ummi-ul-nisa—Plaintiff—Appellant*  
v. *Mt. Fatima Begum and another—Defendants—Respondents.*

Second Appeal No. 237 of 1944, De'd on 3-12-1945, from decision of 2nd Civil Judge, Meerut, D/- 16-9-1943.

(a) Mahommadan Law—Pre-emption—Shia Law—Applicability—Pre-emption suit—All parties Shias—Case is governed by Shia Law.

Where in a suit for pre-emption all the parties—the vendor, the vendee and the pre-emptor—are Shias, the case has to be decided in accordance with the principles of the Shia law of pre-emption. [Para 2]

\* (b) Mahommadan Law—Pre-emption—Shia Law—Talab-i-mowasibat and talab-i-ishhad are both necessary—Latter must make reference to former.

It is not correct to say that the Shia Law requires only one demand or that all that is necessary under the Shia Law is that the pre-emptor should use reasonable diligence in preferring his claim after becoming acquainted with his right. [Para 12]

When, therefore, the *talab-i-ishhad* is made, a reference to *talab-i-mowasibat* is absolutely necessary and in absence of such a reference the *talab-i-ishhad* is defective in an essential particular. [Paras 13 and 14]

*K. C. Mital* — for Appellant.

*Mushtaq Ahmad* — for Respondents.

**Verma J.**—This is a plaintiff's appeal arising out of a suit for pre-emption under the Mahommadan Law. The trial Court decreed the suit but the lower appellate Court has, reversing the decree of the trial Court, dismissed it.

[2] It is common ground that the parties—the vendor, the vendee and the pre-emptor—are all Shias. There can, therefore, be no doubt that the case has to be decided in accordance with the principles of the Shia law of pre-emption.

[3] The plaintiff alleged in the plaint that she had, immediately on hearing of the sale “made the demands required by law in the presence of witnesses” (para. 5). At the trial also the plaintiff's case was that she had made two demands, one immediately on hearing of the sale and the other in the presence of witnesses at the house and in the presence of the vendee. The defendant vendee denied that any demands had been made at all. She pleaded in the alternative that, even if any demands had been made, they had not been made in accordance with law.

[4] The first issue framed by the Munsif was: “Did the plaintiff make the necessary talabs?”

The Munsif began his judgment on this issue with the observation that the parties were Shia and that, “as such, the strict formality of two demands, the immediate demand and demand by invocation, is not necessary.” He continued as follows:

“All that is necessary is that one demand, without any formality, and which should amount to an assertion of her right to be exercised by due diligence and unnecessary delay.”

[5] The sentence, as it stands, is obviously not correct. We take it, however, that what the Munsif meant was that, even according to Shia law, the plaintiff had to exercise her right with due diligence and without unnecessary delay. The next observation of the Munsif was:

“This being the law, the oral evidence produced by the plaintiff on the point must be deemed sufficient.”

[6] He then summarised the evidence given by the plaintiff's witnesses, Mohammad Ahsan and Qudrat Ali, and concluded as follows:

“There are certainly some discrepancies and contradictions in the testimony of the plaintiff's witnesses but they are not so material as to demolish the entire case of demands. Since no formality of demands and the fact that two demands are necessary, are not needed under Shia law, it must be natural in the ordinary course of events, particularly when no notice was given to plaintiff before the sale, that the plaintiff may have asserted a right to pre-empt. I, therefore, hold that the *talabs* were performed.”

[7] Apart from the fact that the penultimate sentence in the passage just quoted is grammatically incorrect, it is obvious that the finding, as recorded by the Munsif, is not a proper finding. The reason given by him for holding that the *talabs* were performed is no reason at all and the use of the word ‘may’ goes to show that probably the Munsif was not quite clear in his own mind as to the value to be attached to the evidence adduced by the plaintiff.

[8] The learned Judge of the lower appellate Court has also unfortunately not recorded a finding which can be said to be a clear finding. He begins by criticising the view of the Munsif that the Shia law did not require any formality in the making of the demands and that it was not necessary under the Shia law to make two demands. He refers to certain passages in Wilson's Anglo-Muhammadan law and K. P. Saksena's Muslim law—to which his attention was apparently drawn by the plaintiff's counsel and concludes that those passages did not mean that “the demands should not be made among the Shias for pre-emption.” He next observes that “the correct legal position is that the plaintiff should have established the making of both the demands in order to be able to pre-empt the vended property.” He then refers to the statements made by the plaintiff's witnesses and observes that the evidence does not show that the second demand, viz., *talab-i-ishhad*, was made according to law, inasmuch as there was nothing in the evidence to show that, when the *talab-i-ishhad* was made, any reference was made to the *talab-i-mowasibat*. He concludes his discussion of the evidence in these words:

“Thus all the three witnesses failed to prove that the demands as required by Mahomedan law were at all made by the plaintiff.”

[9] As shown above, both the Courts below failed to keep questions of fact and questions of



law apart. The learned Judge of the lower appellate Court does not say clearly whether he believes the plaintiff's witnesses and, if so, to what extent. His finding does not make it clear whether any *talab* was, as a matter of fact, made, and, if so, what were the exact words used and what was the procedure followed by the plaintiff. We do not, however, consider it necessary to send the case back to the Court below for a consideration of the evidence afresh and for the recording of clearer findings of fact. We are of opinion that this is a case in which this Court should go through the evidence for itself.

[10] Learned counsel for the plaintiff-appellant has strenuously contended that the view of the law, on the question of demands, expressed by the Munsif was correct. His argument is that according to the Shia law only one demand—and that also without any formality at all—is sufficient. In support of his contention he has relied on para. 489 at p. 474 of Edn. 6 of Wilson's Anglo-Mahomedan Law, edited by Mr. A. Yusuf Ali and on Mr. K. P. Saksena's Muslim Law (1937 Edition) p. 565, para. 5. The paragraph in Wilson's book is as follows:

"The distinction between the immediate demand, *talab-i-mowasibat*, and the formal demand before witnesses, *talab-i-ishhad*, is not recognised. All that is necessary is that the pre-emptor should use reasonable diligence in preferring his claim, either personally or by an agent, after becoming acquainted with his right."

[11] The paragraph in Mr. Saksena's book is as follows:

"The distinction, between the immediate demand and the demand by invocation is not recognised; all that is essential is that the pre-emptor should use reasonable diligence, without any unnecessary delay to make the assertion of his right, after receiving the information."

[12] The paragraph in Saksena's book appears to be a mere reproduction of the paragraph in Wilson's book with slight verbal alterations. It will be noticed that in the paragraph itself it is not stated that only one demand is required by the Shia law. This statement is, however, contained in the placitum to the paragraph which is in these words: "Only one demand necessary." In Mr. Saksena's book this placitum is also reproduced. No authorities are quoted. On the other hand, we have the fact that there is no such statement either in Ameer Ali's book or in Mulla's book on Mahomedan Law. The differences between the Sunni law and the Shia law of pre-emption are stated in both those books at length, but it is not stated in either of them that the Shia law requires only one demand or that all that is necessary under the Shia law is that the pre-emptor should use reasonable diligence in preferring his claim after becoming acquainted with his right. In Wilson's book, below para. 489, a reference is made to Baillie, vol. 2, pp. 183, 184 and 195. We have examined those portions of

vol. 2 of Baillie's Digest of Mahomedan Law and are unable to find any justification for the view that the Shia law requires only one demand. The reference is apparently to the last paragraph at p. 183, which is continued at p. 184, and to the paragraph after it at p. 184. It appears to us that all that Baillie states there is that the Shia law is not so rigid as the Hanafi law, in the matter of the requirement that the pre-emptor, immediately on hearing of the sale, should jump up and shout out that he has a claim for pre-emption. Under the Hanafi law even a moment's delay is fatal. The Shia law, on the other hand, lays down that, should the pre-emptor be delayed in making his demand

"from any necessary cause preventing his personal appearance, or the appointment of an agent to assert it on his behalf, his right is not extinguished."

The Shia law further lays down that a delay in the making of the demand, after receiving information as to the sale, brought about by certain other causes, mentioned in the book, is excusable. All this, it appears to us, refers to the making of the *talab-i-mowasibat*. The passages at p. 195 of Baillie's book do not lay down the law differently. Those passages simply give further details of the circumstances in which delay will or will not be excused. It is nowhere stated in Baillie that the Shia law requires only one demand. Another authority referred to in Wilson's book is "Querry, II." Evidently the reference is to "Droit Musalman, Recueil des Lois concernant les Musalmans Sehytes," in two volumes, by a Querry. That book has not been made available to us, and we are therefore unable to deal with its contents. We see no reason, however, to think that Querry has laid down any proposition which runs counter to what is contained in Baillie's, Ameer Ali's and Mulla's books.

[13] We have gone through the evidence for ourselves and we find that the learned Judge of the lower appellate Court is right in observing that there is nothing in the plaintiff's evidence to show that, when the *talab-i-ishhad* was made, any reference was made to the *talab-i-mowasibat*.

[14] It is well settled that such a reference is absolutely necessary. The result is that, even if the evidence adduced by the plaintiff is believed in toto, the *talab-i-ishhad* was defective in an essential particular. For the reasons given above we dismiss the appeal with costs.

V.R.

Appeal dismissed.

A. I. R. (34) 1947 Allahabad 90 [C. N. 48]  
PATHAK J.

Mt. Anwari Bibi and others — Appellants  
v. Bendesari Singh—Respondent.

Ex. Second Appeal No. 516 of 1944, Decided on 20-2-1946, from decision of District Judge, Benares, D/- 16-11-1943.



**U. P. Tenancy Act (17 [XVII] of 1939), S. 158 —** Section has no retrospective effect and does not deprive landlord of his right to recover arrears of rent due when Act came into force.

Section 158 has no retrospective effect and applies only to cases in which a tenant is ejected after 1-1-1940 the date on which the Act came into force. The plain and grammatical construction of the section is that it does not deprive the landlord of his right to recover the arrears of rent due on the date when the Act came into force: 1941 A. W. R. Rev. 274; 1942 A. W. R. Rev. 74 and 31 A. I. R. 1944 Oudh 86, *Rel. on.* [Para 1]

*Mukhtar Ahmad* — for Appellants.

*Z. H. Lari* — for Respondent.

*Cases referred :—*

1. ('41) 1941 A. W. R. Rev. 274, *Radhika Prasad v. Jiwan.*
2. ('42) 1942 A. W. R. Rev. 74, *Ganga Prasad v. Dwarka Prasad.*
3. ('44) 31 A. I. R. 1944 Oudh 86 : 19 Luck. 418 : 213 I. C. 220, *Durga Baksh Singh v. Uma Nath Baksh Singh.*

**Judgment.** — This execution second appeal is concerned with the interpretation of S. 158, U. P. Tenancy Act of 1939. The facts are very short and may be stated as follows: The decree-holders, the appellants, held a decree for arrears of rent against the respondent in execution of which the respondent was ejected from his holding on 18-8-1939. It appears that in the meantime arrears of rent for a period subsequent to the one in respect of which the aforesaid decree was passed also fell due and on 3-10-1939 the decree-holders filed another suit for recovery of arrears of rent for this subsequent period and obtained a decree on 24-10-1939 in respect of such arrears. All these proceedings had taken place in accordance with the provisions of the Agra Tenancy Act of 1926. On 1-1-1940, the U.P. Tenancy Act of 1939 came into force. On 9-7-1940, the decree-holders made an application for execution of the decree passed on 24-10-1939. The judgment-debtor took an objection that in accordance with the provisions of S. 158, U. P. Tenancy Act of 1939, the arrears of rent in respect of which the decree under execution had been passed should be deemed to have been paid and, therefore, the execution application was not maintainable. This plea has been upheld by both the Courts below and the execution application has been dismissed. The decree-holders have come up in appeal to this Court and it has been urged on their behalf that S. 158, U. P. Tenancy Act of 1939 has no retrospective effect and applies only to cases in which a tenant is ejected after 1-1-1940, the date on which that Act came into force. In my judgment, the contention of learned counsel for the appellant must prevail. Section 158, U. P. Tenancy Act of 1939, which is a new provision, is in the following terms :

"Subject to the provisions of Ss. 159 and 160, when a tenant is ejected from the whole or any portion of his holding in execution of a decree or order of eject-

ment for arrears of rent, all arrears of rent, whether decreed or not, due in respect of such holding on the date of the delivery of possession shall be deemed to have been paid."

For the purposes of this case, Ss. 158 and 160 are not relevant and may be left out of account. The natural and grammatical meaning of the expression "is ejected" is that the tenant is ejected in accordance with the provisions of the U. P. Tenancy Act of 1939 and there is nothing in the context to suggest that this expression means "has been ejected" prior to the coming into force of that Act. As has been stated by me above, there was no corresponding provision in the Agra Tenancy Act of 1926, and on the date of ejectment, namely 18-8-1939 the arrears of rent which were due on that date could not be deemed to have been paid. On 1-1-1940 when the U. P. Tenancy Act of 1939 came into force, the arrears of rent in respect of which the decree had been passed were outstanding and one would have expected the Legislature to have used clearer language if its intention had been to extinguish the right of the landlord to the arrears of rent, which were outstanding on the date when this Act came into force. The language used by the statute does not compel a construction which would have the result of depriving the landlord of his right to recover the arrears of rent due on the date when the Act came into force and I do not see any reason to depart from what appears to me to be the plain and grammatical construction of the section.

[2] I am glad to find that the view that I am inclined to take has been taken by the Board of Revenue as well as by the Oudh Chief Court. See the cases in 1941 A. W. R. Rev. 274,<sup>1</sup> 1942 A. W. R. Rev. 74<sup>2</sup> and A. I. R. 1944 Oudh 86.<sup>3</sup>

[3] The result is that I allow this appeal, set aside the orders passed by the Courts below and direct the Court of first instance to proceed with the execution application in accordance with law. The appellants will get their costs, hitherto incurred from the respondent in all the Courts.

N.S.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 91 [C. N. 49]**

SINHA J.

*Latif and another—Applicants v. Emperor.*

Criminal Revn. No. 651 of 1946, Decided on 8-8-1946, from order of Sessions Judge, Saharanpur, D/- 3-3-1946.

Military Stores (Unlawful Possession) Ordinance (33 [XXXIII] of 1943), S. 3 — Possession — Mahomedan father and his son living jointly—Son cannot along with father be convicted under S. 3.

In the case of a Mahomedan family "possession" of family property must remain with the father and not



with the son. The father is, so long as he is alive, the exclusive owner of the property : 33 A.I.R. 1946 All. 4, *Applied*. [Para 5]

Where, therefore, the father and the son are living jointly the son cannot, along with the father, be convicted under S. 3 of the Ordinance, as being in possession of articles of Military Stores. [Para 5]

*S. K. Verma* — for Applicants.

*Deputy Government Advocate*—for the Crown.

*Case referred :—*

1. ('45) 1945 A. L. J. 528 : 33 A. I. R. 1946 All. 4 *Hirdey Ram v. Emperor*.

**Order.** — Mohammad Siddiq and his son Latif have come to this Court in revision against an order of the learned Sessions Judge of Saharanpur affirming the judgment of a learned Magistrate of the first class, by which he sentenced the former to rigorous imprisonment for nine months and the latter to a fine of Rs. 100 and in default, to rigorous imprisonment for six months.

[2] The charge against them was that a large quantity of melted fired bullets, empty cartridge cases, some live cartridges and some other goods were recovered from the possession of the accused. Mohammad Siddiq admitted the guilt and admitted the possession of the articles. He further stated that his son, Latif, lives separate from him. The learned Magistrate disbelieved this story of separation and passed the sentences mentioned above. This story did not commend itself also to the learned Sessions Judge. He affirmed the conviction.

[3] The learned counsel contends that Latif, who is, as appears from the evidence, still in his teens, cannot even on the findings of the Courts below, be held guilty. Section 3 of the Military Stores (Unlawful Possession) Ordinance 33 [XXXIII] of 1943 says :

"Whoever is found or is proved to have been in possession of any article of military stores shall, if the Court sees reasonable grounds for believing such article to be or to have been the property of His Majesty or of a foreign Power allied with His Majesty, as the case may be, unless he proves that the article came into his possession lawfully, be punishable with imprisonment for a term which may extend to five years or with fine or with both."

[4] The word "possession" came up for consideration in a case under the Indian Arms Act where the accused were junior members of a joint Hindu family and I held in 1945 A. L. J. 528 :<sup>1</sup>

"That possession must be deemed to be with the manager or *Karta* of the family and no other member of the family could be said to have been in possession of the same."

[5] In a Mitakshara family a male member acquires an interest by birth and if 'possession' rests, in law with the *karta* or the manager and not with the junior members, it must, in the case of a Mohamman family, remain, a fortiori with the father and not with the son. The

father is, so long as he is alive, the exclusive owner of the property. The conviction of Latif cannot, in this view of the law, stand and I set aside his conviction and sentence.

[6] As regards Mohammed Siddiq, having regard to his admission of the guilt, the ends of justice shall be sufficiently met if the sentence is reduced from nine months to six months' rigorous imprisonment.

N.S.

*Order accordingly.*

### A. I. R. (34) 1947 Allahabad 92 [C. N. 50]

WALI ULLAH AND BIND BASNI PRASAD JJ.

*Mt. Ram Kuer* — Plaintiff—Appellant v. *Iqbal Narain Singh and others* — Defendants — Respondents.

First Appeal No. 123 of 1943, Decided on 8th May 1946, from order of Additional Civil Judge, Benares, D/-14th February 1943.

U. P. Tenancy Act (17 [XVII] of 1939), S. 242 — Suit whether cognizable by civil or revenue Court — Substance of relief claimed should be looked to—Lease by A of certain land in village to B and C—T thekedar of village obtaining decree for arrears of rent against B, ejecting him in execution and obtaining lease in his favour from A—Suit by B for declaration that proceedings beginning from rent suit up to grant of lease to T were fraudulent and for possession held came under Ss. 59 and 183 and was cognizable by revenue Court only—Civil P. C. (1908), S. 9.

A granted a lease of certain land in a village to B and C. B a pardanashin lady entrusted the management of the property to S. T was the thekedar of the village from A and as such had the right to collect rent from the tenants including B and C. While B was away T brought a suit for arrears of rent against B and C, obtained a decree and in execution of the same got B and C ejected. Subsequently T obtained a lease of the same land in his favour from A. B then brought a suit in the civil Court for declaration that the rent decree, the ejectment proceedings in execution of it and the grant of lease to T were fraudulent and that T had acquired no title under them. The question was whether the suit was cognizable by the civil or revenue Court :

*Held* that (1) in determining the jurisdiction of the civil and revenue Court the pith and substance of the relief and not its form should be looked into. The grounds on which the relief was based were immaterial ; [Para 5]

(2) the essence of the relief claimed by B was really a declaration of her tenancy right and restoration of possession to her as such. The obstacle in her way was the arrears of rent suit and the subsequent grant of patta to T and she wanted to overcome them on the allegation of fraud. The allegations in the plaint clearly amounted to the contention that she was dispossessed of the disputed land "otherwise than in accordance with the provisions of law". The substance of the relief claimed therefore fell within the purview of Ss. 59 and 183 and as such the suit was cognizable by a Revenue Court only : ('35) 22 A. I. R. 1935 All. 499, *Rel. on*. [Para 5]

Civil P. C.—('44-Com) S. 9, N. 7; N. 51.



*Harnandan Prasad*—for Appellant.

*A. P. Pandey and Satya Narain Prasad*—for Respondents.

*Case referred—*

1. ('35) 1935 A.W.R. 393 : 22 A.I.R. 1935 All. 499 : 157 I.C. 665, *Ram Dihal Dubey v. Gajaraj Upadhaya*.

**Bind Basni Prasad J.** — This is an appeal from an order passed by the learned Additional Civil Judge of Benares returning a plaint for presentation to the proper Court. His finding is that the suit was not cognizable by the civil Court but by the revenue Court. The material facts are as follows :

[2] On 4-2-1922, His Highness the Maharaja of Benares granted a lease of 33.71 acres of agricultural land to the plaintiff's husband, Ganga Dut and Jangi Dasondhi, defendant 3, on an annual rent of Rs. 350. The lessees entered into the possession of the property and were regularly paying the rent to the Maharaja. On 6-11-1930, the plaintiff's husband died and then she along with Jagni continued in possession of the land. Now the plaintiff alleges that being a purdanashin lady she entrusted the management of the property to Shankar Nath, defendant 4, who is related to her. In 1933, the plaintiff alleges that she went to the district of Damoh in the Central Provinces to live with her parents and the defendants were fully aware of her address of that place. Now Iqbal Narain Singh defendant 1, in the present case, was the thekadar of this village from the Maharaja of Benares and as such had a right to collect rent from the tenants including the plaintiff and Jangi. She alleged that defendants 1, 3 and 4, conspired to deprive the plaintiff of her rights in the disputed land and with that end in view the thekedar, defendant 1, brought Suit No. 287 of 1933 for the arrears of rent against the plaintiff and Jangi and obtained a decree for the same. It is said that this decree was fraudulently obtained inasmuch as the plaintiff's address was wrongly given therein and she was never informed of the proceedings of that suit. The plaintiff goes on to say that defendant 1 put the decree for arrears of rent into execution and got the plaintiff and the defendant 3 ejected from the disputed land. Further to make a show of the *bona fides* of the decree defendant 1 got Jangi to file an application before the Maharaja of Benares in 1935 for the grant of a fresh lease in favour of himself and the plaintiff. That application was, however, not granted and subsequently defendant 1, who had been from the beginning working up in this direction achieved his purpose by obtaining a patta of the disputed land from the Maharaja of Benares on 14-10-1936. It is alleged that all the proceedings beginning with the institution of the suit for the arrears of rent right upto the grant of the patta in favour of Iqbal Narain Singh, defendant 1,

were fraudulent and as such void and ineffectual. The plaintiff states that she came to know of all these proceedings in July, 1938, when she returned to Benares. She made an application to the revenue Court for the review of the ejectment decree but it was dismissed. An application in revision filed by her before the Commissioner was also dismissed. She then brought a suit in *forma pauperis* in which she claimed the following reliefs :

"(a) With a declaration that decree No. 287 of 1933 passed by the revenue Court in the suit, *Maharaja of Benares v. Mst. Ram Kuar*, the ejectment proceedings in execution of it and the grant of the lease to defendant 1, are fraudulent and that defendant 1, has acquired no title under them; defendant 1 may be ejected from the disputed land and possession may be given to the plaintiff.

(b) Rs. 300 for the past mesne profits and Rs. 100 per annum for future mesne profits be awarded.

(c) Costs of the suit may be awarded against defendant 1 or against such of the defendants as may be found liable."

[3] By a careful judgment, the learned Additional Civil Judge held that the suit was barred by ss. 59 and 183, read with s. 242, U. P. Tenancy Act, 1939. In the result he directed that the plaint be returned for proper presentation. The plaintiff prefers this appeal against that order. Now s. 59, U. P. Tenancy Act, provides as follows :

"59. (1) Any person claiming to be a tenant or a joint tenant may sue the landholder for a declaration that he is a tenant or for a declaration of his share in such joint tenancy.

(2) In any suit under this section any person claiming to hold through the landholder, whether as tenant or otherwise, shall be joined as a party."

[4] Section 183, U. P. Tenancy Act provides for the remedies of a tenant ejected from, or prevented from, obtaining possession of his holding, otherwise than in accordance with the provisions of the law for the time being in force. Under this section, he can bring a suit for possession of the holding and for compensation for wrongful dispossession. Section 242, Tenancy Act provides that all suits and applications of the nature specified in the Fourth Schedule shall be heard and determined only by a Revenue Court.

[5] Now suits under ss. 59 and 183 appear at serials Nos. 3 and 19 respectively in Group B of the Fourth Schedule annexed to the U. P. Tenancy Act. The whole question, therefore, is whether or not the present suit can be said to be one under the provisions of ss. 59 and 183. Stripped of all its verbiage, the suit is essentially one for a declaration of the plaintiff's title as a co-tenant of the disputed plot with Jangi and for possession of the same. The allegations contained in the plaint clearly amount to the contention that she was dispossessed of the disputed land "otherwise than in accordance with the provi-



sions of the law." The facts of this case are parallel with those of 1935 A. W. R. 393.<sup>1</sup> That was also a case in which the plaintiff sued for a declaration that an ejectment order passed against him in favour of the defendant had been fraudulently obtained and was as such ineffectual. Despite the allegation of fraud, it was held that the suit was not cognizable by the Civil Court, but should have been brought in the revenue Court. It was remarked that an ejectment brought about by fraudulent proceedings was tantamount to an ejectment otherwise than in accordance with the provisions of the Act. Learned counsel for the appellant questions the correctness of that ruling. He contends that when there is a relief for a declaration that the proceedings in the arrears of rent suit were tainted with fraud the suit is cognizable only by the Civil Court. The essence of the relief claimed by the plaintiff is really a declaration of her tenancy right and restoration of possession to her as such. The obstacle in her way is the proceedings in the arrears of rent suit and the subsequent grant of patta to defendant 1, and she wants to overcome them on the allegation of fraud. In determining the jurisdiction of the civil and the revenue Court, we must see the pith and the substance of the relief and not to its form. The grounds upon which the relief is based are immaterial. The substance of the relief claimed in the present suit really falls within the purview of ss. 59 and 183, U. P. Tenancy Act. As such the suit was cognizable by the revenue Court only. There is no legal bar to the revenue Court going into the allegations of fraud made by the plaintiff. We agree with the conclusion arrived at by the lower Court. In the result the appeal fails and it is hereby dismissed with costs.

G.N.

*Appeal dismissed.***A. I. R. (34) 1947 Allahabad 94 [C. N. 51]**

MALIK AND WALI ULLAH JJ.

*Prem Narain — Plaintiff — Appellant v. Hansraj Singh and others — Defendants — Respondents.*

First Appeal No. 55 of 1943, Decided on 6-3-1946, from order of Civil Judge, Mainpuri, D/- 8-10-1942.

Hindu law—Limited owner—Surrender—Deed of—Limited owner need not purport to transfer property to next reversioner—Giving up her rights in property is sufficient—Composite deed of surrender and family settlement by daughters of deceased owner—Daughter's sons dividing property per stirpes according to settlement—Daughters held made complete effacement of their rights—Settlement held was valid.

It is not necessary for a deed of surrender that the limited owner should purport to transfer the property to the next reversioner. All that is necessary for her to do is to give up her rights in the property and then

as a matter of law the property would vest in the nearest reversioner. In case a widow surrenders her rights by purporting to transfer it to a reversioner the surrender would only be valid if the property was given to the whole body of next reversioners. [Para 6]

One *J* who died leaving a widow *S* and daughters *C*, *K* and *P* had before his death made an oral will under which *S* was to be the owner of his property for her life time and after her death the property was to go to the three daughters in equal shares and the share given to each of them was to be inherited by her children. Accordingly after *J*'s death the name of *S* was recorded in the papers. *S* died and *C* died soon after. Subsequently disputes having arisen as to the succession, *K* and *P* by a deed surrendered their life estates and the grandsons of *J* who were then in existence divided the property in three equal shares *per stirpes*. The deed which *K* and *P* executed was a composite document purporting to be a deed of surrender and an arrangement as regards the title to the property. Not only at the end it was called a deed of relinquishment but also in the body of the document it was provided that *K* and *P* of their own free will and accord had relinquished their rights and interests in the property. They reserved absolutely no right under this document nor were they given any share in the property. *P* died after the compromise. In a suit by the third son of *K* who was born five years after this compromise for a declaration that the plaintiff and other daughters' sons of *J* were the owners of his property after the death of *K*, the surrender was attacked as being not *bona fide*:

*Held* that *K* and *P* had made a complete effacement of their rights by the deed of surrender and after that they ceased to have any interest in the property and succession opened out to the reversionary body as then existing, that it was open to the reversionary body to divide the property by mutual agreement and that the family settlement was, therefore, a valid settlement as being in accordance with the directions contained in *J*'s will as also under the Hindu law, assuming that there was no will of *J*. [Para. 7]

*P. M. Verma*—for Appellant.

*M. N. Rama*—for Respondents.

**Malik J.** — This is a plaintiff's appeal. One Jwala Prasad who was the last male owner of the properties now in suit died in the year 1916. At the time of his death he left a widow Mst. Shiva Kunwar and three daughters, Mst. Chandan Kunwar—she has at times been also described as Mst. Chandrika Kunwar—Mst. Champa Kunwar and Mst. Phulmati Kunwar. On the death of Jwala Prasad, the name of his widow Mst. Shiva Kunwar was entered in the papers. She died sometime in the year 1918 and Chandan Kunwar, the eldest daughter died soon after. A dispute arose between Champa Kunwar and Phulmati Kunwar and the sons of Chandan Kunwar as to the succession. The sons of Chandan Kunwar set up some claim to the property but it is not clear what exactly their claim was. Ultimately the matter was settled in this way that Champa Kunwar and Phulmati Kunwar surrendered their life estates and the grandsons of Jwala Prasad who were then in existence divided the property in three equal shares *per stirpes*. They have been in possession in accordance with the division of the property in



the year 1918. The plaintiff Prem Narain is the third son of Champa Kunwar who was born in the year 1923, five years after the compromise. He has filed this suit claiming a declaration in these terms :

"This plaintiff and other daughters' sons of Jwala Prasad aforesaid are the owners of the property mentioned below after the death of Mst. Champa Kunwar, defendant 8."

[2] Phulmati died in the year 1925 and her son Jagat Narain predeceased her in 1923. The share that was allotted to Jagat Narain is now in the possession of his father Hansraj. Though the plaintiff has not claimed any relief with respect to the surrender and the compromise dated 28-11-1918, learned counsel appearing for him has assured us that that was what his client intended. The allegations of the plaintiff are that Mst. Champa Kunwar and Phulmati Kunwar were not entitled to surrender their life estate in favour of the next reversioners and this has been explained to us by learned counsel to mean that the surrender was not a *bona fide* surrender but was a device to devide the property between the daughters and the grandsons. His second line of attack is that Champa Kunwar and Phulmati Kunwar have asserted in the compromise dated 28-11-1918, that Jwala Prasad had left a will in accordance with which the property was to devolve after the death of Jwala Prasad. Learned counsel has argued that the reference to the will vitiates the surrender. His third objection is that the surrender is invalid as the six daughter's sons who were then in existence were not given one-sixth share each as they were entitled to under the law but the property was divided *per stirpes* between the sons of the three daughters of Jwala Prasad.

[3] The will mentioned in this compromise was not admitted on behalf of the plaintiff and his case was that Jwala Prasad had died intestate and had left no will. The lower Court has accepted the evidence of the defendants' witnesses, Hansraj and Totaram, that Jwala Prasad did make a will. We do not see any relevancy to the question of this will as regards the validity of the surrender, but apart from that we are of the opinion that the lower Court was right in accepting the evidence of the witnesses for the defendants that Jwala Prasad before his death had left an oral will. The lower Court has pointed out that if there was no will left by Jwala Prasad there was no reason why any mention should have been made of this will in the compromise dated 28-11-1918. The will attempted to follow as far as possible ordinary rule about succession according to Hindu law. According to the terms of this will Mt. Shiva Kunwar, the widow of Jwala Prasad, was to be the

owner of the property in her lifetime and after her death the property was to go to the three daughters of Jwala Prasad in equal shares and the share given to each daughter was to go to her issue. At the time of the compromise dated 28-11-1918, Mt. Chandan Kunwar was no doubt dead but two of the daughters, Mt. Champa Kunwar and Mt. Phulmati Kunwar were alive and were both married and had children. Phulmati is now dead. Champa Kunwar is alive; she is a party to this suit. She has not filed any written statement nor she has come into the witness box to explain why a false statement was made in this document that there was an oral will of Jwala Prasad if Jwala Prasad had made no such will in his lifetime. Learned counsel has mentioned to us a registered will executed by Shiva Kunwar on 8-1-1917. The document is not now on the record, nor has it been translated or included in our paper-book. The lower Court thought that there was some reference to the will of Jwala Prasad in this will made by the widow of Jwala Prasad. Learned counsel for the appellant has assured us that there is no mention of the will but what the widow purported to do was to carry out the last wishes of her husband. There is not much difference between the two and we agree with the Court below that that also lends some support to the evidence given on behalf of the defendants that Jwala Prasad after he had been attacked by paralysis sent for his daughters and his grandsons and his widow and told them how he wanted his property to devolve after his death so that they may not quarrel among themselves about the devolution of the estate.

[4] Hansraj, defendant, is no doubt an interested witness in the sense that after the death of Jagat Narain he has now become entitled to Jagat Narain's share in the property but he was cross-examined at great length about the oral will and the learned Judge accepted his testimony and that of Totaram, the other witness for the defendant. Learned counsel for the plaintiff while cross-examining these witnesses insisted on their repeating the contents of the will of Jwala Prasad as far as possible in the words of Jwala Prasad. We do not see any material difference in the version given by these two witnesses. The plaintiff produced two witnesses, Gopi Nath and Ganga Singh, to prove that Jwala Prasad immediately after he got the attack of paralysis became unconscious. It is not an usual experience to find a man becoming unconscious immediately after an attack of paralysis unless the attack was very severe. Generally it takes two or three days before a man becomes unconscious. In any case their evidence was not accepted by the Court below



and in a matter where the learned Judge had the advantage of having the witnesses examined in chief and cross-examined before him we do not see any reason why we should differ from his conclusions specially as those conclusions are supported by the other circumstances which appear from the record. We, therefore, agree with the decision of the Court below that Jwala Prasad before his death made an oral will under which Shiva Kunwar was to be the owner of the property for her lifetime and after her death the property was to go to the three daughters of Jwala Prasad in equal shares and the share given to each of the daughters was to be inherited by her children.

[5] Coming back to the document dated 28-11-1918, the document purports to be a deed of surrender or *dastbardari* and a *tamliknama* or an arrangement as regards the title to the property. It is a composite document. Learned counsel had to agree that if the parties had executed two separate documents, one under which Mt. Champa Kunwar and Mt. Phulmati Kunwar had merely surrendered their rights, i. e., they had effaced themselves and the other by way of a family settlement by which the grandsons had decided to hold the property in certain shares, he could not have challenged the deed of surrender. As we read this document it is clearly divisible into two distinct parts. Not only at the end it is called a deed of relinquishment and *tamliknama* but also in the body of the document it is provided as follows:

"Consequently, we, Mt. Champa Kunwar and Phulmati Kunwar, have, of our free will and accord, without coercion and compulsion of any one else and while in full possession of our five senses, relinquished our rights and interests in the property aforesaid."

[6] Mt. Champa Kunwar and Mt. Phulmati Kunwar reserved absolutely no right under this document nor were they given any share in the property. The suggestion made by learned counsel that this was a device to divide the property does not appeal to us. What he has argued is that the idea was that Champa Kunwar and Phulmati Kunwar would enjoy the property during the minority of their sons in the name of their sons. We do not think that there is any basis for this suggestion. Champa Kunwar and Phulmati Kunwar if they were only anxious to manage the property they had the right to do so both under the will of Jwala Prasad as well as under the Hindu law and it was not necessary for them to enter into any such device. Moreover both of them had their husbands alive and it would have been their husbands who would have managed the property on behalf of their minor sons. It is clear from the document that Champa Kunwar and Phulmati Kunwar wanted to completely efface themselves to avoid any

dispute in future. It is not a case where there was any division of property between a limited owner or her nominee, a third party, and the reversioners. It is a case where two limited owners effected a complete effacement of their rights and after the deed of surrender of 28-11-1918, the property as a matter of law vested in the grandsons of Jwala Prasad who were then six in number. It is not necessary for a deed of surrender that the limited owner should purport to transfer the property to the next reversioner. All that is necessary for her to do is to give up her rights in the property and then as a matter of law the property would vest in the nearest reversioner. In case a widow surrenders her rights by purporting to transfer it to a reversioner the surrender would only be valid if the property was given to the whole body of next reversioners. Here as we read the document, in the first part of the deed which we have already quoted, Champa Kunwar and Phulmati effected an effacement of their rights. In the second part of the document the grandsons of Jwala Prasad decided by a family settlement in what shares they would hold the property. This arrangement is in accordance with the directions of Jwala Prasad and is therefore perfectly valid.

[7] Even apart from that, we do not see what ground for objection the present plaintiff can have. In the year 1918, after the surrender by Champa Kunwar and Phulmati Kunwar, the property, assuming that there was no will of Jwala Prasad, would have vested in the sons and grandsons, who were then in existence, in equal shares and the two sons of Champa Kunwar would have got one-sixth each, that is the branch of Champa Kunwar would have got only one-third. The plaintiff was not born till five years after the surrender. Even if there was no family settlement, the plaintiff would be entitled to get a share in the one-third that came to the two sons of Champa Kunwar who were in existence at the time of the surrender. The plaintiffs would have had no right to get a share out of the property that had vested in the sons of Chandan Kunwar and Phulmati Kunwar after they had partitioned the property and taken away their shares, that is, under the Hindu law after the surrender by the two life estate holders the sons of Chandan Kunwar would have got a half share and the son of Phulmati Kunwar would have got a one-sixth and the sons of Champa Kunwar would have got the remaining one-third, and after they had partitioned the property, if a son was born to Champa Kunwar, he would have had to share in the one-third that came to his branch. Learned counsel admitted that his client would not be entitled to anything more than a share



in the one-third that would have come to the branch of Champa Kunwar, but he alleged that if the surrender was invalid the partition between the grandsons of Jwala Prasad would not bind the ultimate reversioner whoever he may be and the plaintiff had a right to file a suit in a representative capacity for the benefit of the actual reversioner in whom the property might ultimately vest. We have already held that we see no reason to hold that the surrender was invalid. The Court below has held that Champa Kunwar and Phulmati Kunwar had made a complete surrender of their rights on 28-11-1918, and after that they ceased to have any interest in the property and succession opened out to the reversionary body as then existing, that it was open to the reversionary body to divide the property by mutual agreement and that the family settlement was, therefore, a valid settlement. We fully agree with this finding. The appeal has no force and we dismiss it with costs.

V. R.

*Appeal dismissed.***A. I. R. (34) 1947 Allahabad 97 [C. N. 52]**

SINHA J.

*Mirro—Accused—Applicant—v. Emperor.*

Criminal Appeal No. 562 of 1945, De'd on 13-8-1946, from order of Asst. Sessions Judge, Agra, D/-18-7-1945.

Penal Code (1860), S. 377—Offence under section alleged to be complete—Medical evidence should be definite against accused—Existence of semen marks on accused's dhoti is not decisive factor.

If it is not the case of the prosecution that the offence under S. 377 remained uncompleted, the medical evidence should be definite against the accused. Where the Civil Surgeon does not find any marks of injury on the anus of the boy but he qualifies his statement by a further observation that the boy was quite grown up and, in such cases, there may be no marks of injury, the rider added by the Civil Surgeon is somewhat inconsistent and the medical evidence must be regarded as definitely in favour of the accused. The existence of semen marks on dhoti of the accused is by no means a decisive factor. [Para 6]

*P. C. Chaturvedi*—for Applicant.

*Deputy Government Advocate*—for the Crown.

**Judgment.**—Mirro was placed on his trial before the learned Assistant Sessions Judge of Agra for an offence under S. 377, Penal Code, in that he committed unnatural offence upon a boy named Ram Dayal and has been sentenced to rigorous imprisonment for seven years.

[2] According to the story for the prosecution Ram Dayal had gone to the shop of a man named Sakko, alias Sakoor, a blacksmith, to take the implements which he had given him for repairs. The accused caught hold of the hand of the boy and wanted to take him away forcibly. Sakoor intervened and was slapped by the accused who took away the boy forcibly to an

enclosure. This enclosure belongs to the brother-in-law of the accused, a man named Ajmeri. There he committed the offence. Sakoor ran to inform the members of the family of the boy and met them half way somewhere near Baker Park. All this took place between 4-30 and 5 P. M. Sakoor informed Girandra Singh. With him was another man, Sia Ram. He told them that Mirro had taken away the boy forcibly for unnatural offence. On the way he met Ram Chand, Ghasi and a few others. All went to the place of the occurrence and caught the accused red-handed.

[3] The accused pleaded, in defence, that there was bad blood between him and the *Chamars*, Ram Dayal is a *chamar* by caste; and this prosecution is the result of that enmity. The learned Assistant Sessions Judge found that the prosecution had successfully established the case and, in disagreement with the unanimous opinion of the assessors, passed the sentence mentioned above. The accused has come to this Court in appeal.

[4] Ram Dayal went into the witness box and stated how he was taken by the accused, in spite of the intercession of Sakoor whom he slapped, how he was felled on the ground and injured his knees and how the offence was committed. He has been supported by a number of witnesses. But, on a careful examination of the entire evidence, I am not quite free from doubt in my mind that the prosecution is not the result of the strained relations between the accused and the party of Ram Dayal.

[5] The accused, it is admitted, is a notorious bully. He is the brother-in-law of a still more notorious bully, Ajmeri. That he is a terror and is hated by the people of the place seems to be quite natural. It is not surprising if he has incurred the displeasure also of the police. It seems clear too, that he is not only a desperate character but is a man of depraved morality. But beyond this the evidence does not establish anything against him.

[6] The medical evidence is definitely in his favour. The boy was medically examined. It is not the case of the prosecution that the offence remained uncompleted. If so, the medical evidence could and should have been definite against him, but it is not so. The Civil Surgeon did not find any marks of injury on the anus of the boy but he qualified his statement by a further observation that he was quite grown up and, in such cases, there may be no marks of injury. It appears to me that the rider added by the Civil Surgeon is somewhat inconsistent. Be that as it may, the medical evidence does not go against the accused. It is true that there were marks of semen on the dhoti of the accused, but this is by no means a decisive factor. The medical evidence, therefore, does leave a gap in the story for the prosecution and it remains to be considered



whether that gap has been filled or repaired by the other evidence which has been led by it.

[7] Even assuming, as I have already said, that he is a terror and a daring bully the evidence seems to draw an exaggerated, if not an entirely false, picture of the accused. The scene is laid in one of the busy quarters of the town of Agra. The shop, where the accused is alleged to have caught hold of the boy is surrounded by several other shops. The time was 4.30 or 5 P.M. which, according to the learned Judge himself, was the hour of the day "when people go out to market." That the accused should have caught hold of the boy at such a time and such a place seems difficult to believe. That he should have dragged the boy to some distance appears to be almost incredible. Then, again, according to the boy himself, the offence did not take more than five minutes and yet, according to Ram Dayal himself, people continued to ask the accused "for about fifteen or twenty minutes," to leave him and yet he was adamant. Not only that he received lathi blows. If the offence did not take more than five minutes, the two statements seem to be irreconcilable. Not only are the two portions of the statement of Ramdayal irreconcilable, but the evidence of Sakoor, P. W. 2, disproves the presence of the four or five men mentioned by the boy as having been present at the time of the offence. The accused had taken away the boy and it was then that Sakoor went out to inform his relations and the members of his party. He must have taken some time to find them out and then to inform them and for them to have reached the spot. This is the class of evidence which has been led in the case and this evidence hardly carries conviction to one's mind.

[8] A careful examination of the entire evidence does leave an impression on one's mind that the accused is an undesirable person who has made many enemies and the case is the outcome of that enmity. The learned Assistant Sessions Judge has at one place of his judgment, remarked that the station officer, Imdad Husain, was a Musalman and it was impossible that he should have brought a false case against an innocent Musalman. The learned Assistant Sessions Judge is dead and nothing is further from my mind than to say anything in disparagement of his memory but I feel constrained to say that there was no warrant for introducing this communal tinge in the case. There was no question of any communal feeling. Sakoor, the principal prosecution witness, is a Musalman. All the assessors, who found the accused not guilty, are Hindus. They are Mahendra Singh, Narain Singh and Chhattarpal.

[9] On a careful consideration of the entire case, I share the view of the assessors rather than of the learned Assistant Sessions Judge. I, therefore, allow the appeal and set aside the conviction and sentence. The accused shall be released forthwith unless he is wanted in connection with some other case.

V.R.B.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 98 [C. N. 53]**  
MOOTHAM J.

*Suraj Bali Singh and others—Respondents*  
— *Applicants v. Jadu Nandan Singh and others—Appellants—Opposite Party.*

Civil Rev. No. 374 of 1945, De'd on 4-9-1946, against decree of Dist. Judge, Ghazipur, D/ 12-9-1944.

Civil P. C. (1908), S. 115—Application for withdrawal of suit — No objection by defendant provided he is allowed full costs — Order allowing withdrawal cannot be interfered with on ground that no reasons for withdrawal were given — Civil P. C., O. 23, R. 1.

Ordinarily the High Court is not disposed to exercise its discretionary powers under S. 115 for the purpose of setting aside an order of a lower Court which was made with the consent, express or tacit, of the person who seeks to have that order vacated. Consequently, where the defendant allows the Court to grant an application for withdrawal of suit without any opposition provided he gets the full costs, it is unnecessary for the Court to go into the question whether a formal defect or other sufficient cause existed to justify the withdrawal of the suit and therefore it cannot be said that the Court acted with material irregularity in not stating the reasons for withdrawal so as to justify interference in revision: 25 A.I.R. 1938 All. 450, *Rel. on.*; 15 A.I.R. 1928 All. 98, *Disting.* [Para. 5]

C. P. C.—('44-Com.) O. 23, R. 1, N. 41, pt. 9.

S. N. Singh—for Applicants.

*Cases referred :—*

1. ('28) 50 All. 199: 15 A. I. R. 1928 All. 98: 106 I. C. 431, *Kamta Singh v. Bhagwan Das.*
2. ('38) 25 A. I. R. 1938 All. 450: 177 I. C. 73, *Ragho Sewak Rai v. Bhola Singh.*

**Order.** — Jadu Nandan Singh and three others filed an application against the present applicants in the Court of the Revenue Officer of Ghazipur under S. 12, Agriculturists' Relief Act, 1935. The application was dismissed, and an appeal against the order dismissing the application was filed in the Court of the District Judge of Ghazipur. In the course of the hearing of the appeal the appellants filed an application under O. 23, R. 1, Civil P. C., asking for permission to withdraw from the suit on the ground that the latter must fail, by reason of a formal defect. This application was allowed, and it is against the order of the learned District Judge, dated 12-9-1944, allowing the suit to be withdrawn, that this application in revision under S. 115, Civil P. C., has been filed. The ground on which it is urged that it is proper for this Court to interfere is that the learned District Judge acted



in the exercise of his jurisdiction with material irregularity inasmuch as he, in disposing of the application, failed to state the reasons which in his opinion justified the appellants' withdrawal from the suit.

[2] The order of the lower Appellate Court was very brief, and is in the following terms:

"Plaintiff appellant is allowed to withdraw from the suit with permission to bring a fresh suit because the suit is likely to fail for a formal defect. Defendants respondents who do not oppose this application shall get their full costs of both the Courts."

[3] I was referred by the present applicants to several decisions of this Court the most recent of which appears to be 50 All. 199<sup>1</sup>—in which it was said that the failure of a Court to state the reasons for which it permitted a plaintiff to withdraw from a suit constituted a material irregularity. But it will be found, I think, on closer examination, that the basis of the decision in these cases was the failure of the lower Court to exercise the discretion vested in it under O. 23, R. 1, in a judicial manner, of which the absence of a statement of the grounds upon which the Court was satisfied that permission to withdraw from the suit (*sic* should be granted) was evidence.

[4] Now can it be said that in the present case the learned District Judge failed to exercise his discretion in a judicial manner? I think not. The present applicants were represented in Court when the application under O. 23, R. 1 came before the learned Judge; and they did not oppose that application. In effect they tacitly consented to the application so long as they obtained their costs in both Courts.

[5] The effect of an order in very similar terms to that made by the lower Appellate Court in the present case was considered by Allsop J. in A. I. R. 1938 All. 450.<sup>2</sup> In that case the learned Judge expressed the view that it was unnecessary for a Court to go into the question whether a formal defect or other sufficient cause existed to justify the withdrawal of the suit when the parties were essentially in agreement. That, in my view, was the position in the present case, and I do not think, therefore, that the learned District Judge in making the order which he did make acted with material irregularity. In any event I should not, on general grounds, ordinarily be disposed to exercise my discretionary powers under S. 115, Civil P. C., for the purpose of setting aside an order of a lower Court which was made with the consent, express or tacit, of the person who now seeks to have that order vacated. This application must be rejected.

K.S.

Revision dismissed.

A. I. R. (34) 1947 Allahabad 99 [C. N. 54]

VERMA AND BIND BASNI PRASAD JJ.

*Emperor v. Jagmohan Thukral and another — Accused — Opposite party.*

Criminal Ref. No. 189 of 1946, De'd on 16-8-1946, made by Asst. Sessions Judge, Saharanpur, D/- 17-1-1946.

(a) Criminal P. C. (1898), S. 307 (2)—Submission to High Court only part of case is irregular—Where part of case is submitted High Court can consider whole case and pass suitable order.

The procedure of submitting to the High Court only a part of the case under S. 307, is irregular. Under that Section the whole case should be submitted to the High Court and no judgment of conviction on any head of the charges should be recorded by the Sessions Judge. Where only a part of the case is submitted, the High Court can consider the whole of the case, substitute its own judgment and sentence for that awarded by the Sessions Judge and dispose of the reference in respect of the other heads of the charges on merits: 17 A. I. R. 1930 All. 489, *Foll.* [Para 4]

(b) Criminal trial — Evidence — Accused can be convicted on circumstantial evidence only when evidence is incompatible with his innocence.

It is a well-established principle of law that an accused can be convicted on circumstantial evidence only when such evidence is quite incompatible with his innocence and there can be a reasonable certainty of his guilt. [Para 7]

(c) Criminal P. C. (1898), S. 307 (3) — Unanimous verdict of jury — One out of two reasonable views taken by jury — High Court will not interfere.

When in a case two reasonable views are possible and the jury takes one such view, the High Court will not, while considering the case submitted to it under S. 307, interfere with it, especially when it is a unanimous verdict. [Para 10]

(d) Criminal P. C. (1898), S. 303 (1) — Judge cannot ask jury to give reasons for their verdict in writing.

Under S. 303, the Sessions Judge can ask the jury only such questions as are necessary to ascertain what their verdict is. This does not mean that they can be asked to give their reasons. And, hence, the Sessions Judge cannot ask the jury to give reasons for their verdict in writing. [Para 10]

(e) Criminal P. C. (1898), S. 307 (3) — Verdict of jury not perverse — High Court will not interfere.

In cases tried by jury where there has been a verdict of not guilty the High Court will not reverse the verdict of the jury unless it is perverse or manifestly wrong. The verdict of a jury, especially when it is unanimous, will not be lightly displaced: 25 A. I. R. 1938 All. 227, *Foll.*; 15 A. I. R. 1928 All. 207 (F.B.), *Expl.* [Para 11]

(f) Arms Act (1878), S. 19 (f) — Possession of gun by person having no licence is punishable.

If a person having no licence possesses a gun even for a short time, he commits an offence under S. 19 (f): 12 A. I. R. 1925 All. 396, *Disting.* [Para 12]

(g) U. P. First Offenders' Probation Act (6[VI] of 1938), Ss. 3 and 4 — First offender convicted under S. 19 (f), Arms Act — S. 4 and not S. 3 applies.

To the case of a first offender, aged 15 years, convicted of an offence under S. 19 (f), Arms Act, for possessing a gun without licence, S. 4 and not S. 3, U. P. First Offenders' Probation Act, applies. [Para 13]

[However the High Court, under the circumstances of this case, refused to apply it.]

Deputy Government Advocate — for the Crown.

G. S. Pathak, V. D. Bhargava, R. K. Dave, G. C. Mathur and Gyanendra Kumar — for Opposite party.



*Cases referred:—*

1. ('30) 52 All. 881: 17 A. I. R. 1930 All. 489: 128 I. C. 2, Emperor v. Nawal Behari.
2. ('81) 3 All. 776, Empress of India v. Idu Beg.
3. ('05) 2 A. L. J. 475, Emperor v. Chirkua.
4. ('24) 46 All. 265: 11 A. I. R. 1924 All. 411: 81 I. C. 629, Emperor v. Panna Lal.
5. ('28) 50 All. 625: 15 A. I. R. 1928 All. 207: 108 I. C. 225 (F.B.), Emperor v. Shera.
6. ('31) 1931 A. L. J. 695: 133 I. C. 475, Emperor v. Madan Gopal.
7. ('38) I. L. R. 1938 All. 483: 25 A. I. R. 1938 All. 227: 175 I. C. 130, Emperor v. Bansi.
8. ('25) 23 A. L. J. 356: 12 A. I. R. 1925 All. 396: 47 All. 606: 87 I. C. 523, Babu Ram v. Emperor.
9. ('33) 20 A. I. R. 1933 Cal. 665: 145 I. C. 236 (S.B.), Emperor v. Bisnoo Chandra.
10. ('32) 11 Pat. 395: 19 A. I. R. 1932 Pat. 156: 137 I. C. 190, Emperor v. Hazari Lal.
11. ('35) 14 Pat. 717: 22 A. I. R. 1935 Pat. 357: 155 I. C. 866, Ram Janam v. Emperor.

**Bind Basni Prasad J.** — This is a reference by the learned Assistant Sessions Judge of Saharanpur under s. 307, Criminal P. C. The complainant in this case was a European British subject. The two accused are British Indian subjects and they claimed the trial by jury under the provisions of Chap. 33 of the Code. The committing Magistrate held that they were entitled to this. The learned Assistant Sessions Judge accordingly tried the two accused with five jurors.

[2] It is an undisputed fact that at about 2-30 A.M. on the night between 8th and 9th August 1945, Fusilier Spence and Captain (now Major) Wright, who were out for military exercise near the Mohand pass on Dehradun Saharanpur road, received some gun-shot wounds. Fusilier Spence died the following morning at about 10 A. M. According to the post-mortem examination conducted by Captain Lahiry the cause of death of Fusilier Spence was concussion of the cord and medulla oblongata due to gun-shot wound. The pellet was extracted at the post-mortem examination from the tissue behind the larynx in front of the fourth cervical vertebræ. It was handed over by Captain Lahiry to the police and was produced before the learned Assistant Sessions Judge. According to Mr. Harris, Deputy Superintendent of Police, P. W. 10, the pellet was one which is usually put in L. G. cartridges ordinarily used in a 12-bore gun. Captain Wright received three injuries. The first one was on the neck. The second one was an entry on the ulnar side of the left wrist and an exit on the radial side of the wrist. The third wound was on the buttock. Captain Wright was discharged from the hospital after 15 days. He was examined before the learned Assistant Sessions Judge on 11th December 1945 and he stated that even then he was undergoing massage, radiant heat and faradism in an endeavour to bring back the sense of his jaw and wrist nerves.

[3] There are to accused in this case, Jagmohan Thukral, aged 26 years and Ravi Thukral, aged 15 years. The former is one of the proprietors of the Green Hotel at Dehra Dun and the latter is a student. They are first cousins. The charge against Ravi was that it was he who caused the injuries to Fusilier Spence and Captain Wright while coming by car from Saharanpur to Dehra Dun on the night of the occurrence. He held no licence for a gun. On these allegations he was charged with offences under ss. 304A and 337, Penal Code, and s. 19 (f), Arms Act. Jagmohan accused was also in the car along with Ravi and it is alleged that it was with his gun that Ravi committed the offence. He was, therefore, charged for abetment of the offences under ss. 304A and 337, Penal Code, and for the substantive offence under s. 21, Arms Act. He holds a licence for the gun. The unanimous verdict of the jury was that Ravi was not guilty of the offences under ss. 304A and 337, Penal Code but was guilty of the offence under s. 19 (f), Arms Act. As against Jagmohan the jury returned a unanimous verdict of not guilty in respect of all the three offences with which he was charged. The learned Assistant Sessions Judge agreed with the verdict of the jury under s. 19 (f), Arms Act as against Ravi and sentenced him to a fine of Rs. 200 or in default to undergo a simple imprisonment for three months. He disagreed, however, with the rest of the verdict and has referred the case to this Court recommending that Ravi be convicted of the remaining two offences and Jagmohan of all the three offences for the commission of which they were charged.

[4] I may say at the outset that the procedure adopted by the learned Assistant Sessions Judge in submitting to this Court only a part of the case is irregular. Sub-section (2) of s. 307, Criminal C. P., provides as follows:

"Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried, but he may either remand such accused to custody or admit him to bail."

It is clear from the above provision that the whole case should have been submitted to this Court and no judgment of conviction on any head of the charges should have been recorded by the learned Assistant Sessions Judge. A similar point came up before this Court in 52 All. 881.<sup>1</sup> In that case also the learned Sessions Judge had convicted the accused on some of the charges and disagreeing with the verdict of the jury in respect of the other charges had referred that part of the case only to this Court. This Court, while expressing its disapproval of the procedure adopted by the learned Sessions Judge, consi-



dered the whole of the case, substituted its own judgment and sentence for that awarded by the learned Sessions Judge and disposed of the reference in respect of the other heads of the charges on merits. I think it would be proper to adopt the same procedure in the present case. I shall consider the whole of the case and not only so far as it relates to the charges under ss. 304A and 337, Penal Code and S. 21, Arms Act.

[4a] Now from the mere fact that Ravi has been charged under S. 304 A it is obvious that it is not the prosecution case that he or Jagmohan intended to wound Fusilier Spence and Captain Wright or did the alleged act with the knowledge that it was likely to result in injury to these two persons. The charge against Ravi is that he committed a rash and negligent act by firing two shots at night into the forest without taking good care, with consequent injuries to Fusilier Spence and Captain Wright. The accused deny that the injuries to Fusilier Spence and Captain Wright were caused from their gun shots and suggest that some other party was responsible for the same. They further contend that even if it be held that the injuries were caused from their gun shots, they committed no rash or negligent act and that they are protected by S. 79, Penal Code, which provides *inter alia* that nothing is an offence which is done by any person who by reason of a mistake of fact in good faith believes himself to be justified by law in doing it.

[5] Before examining the prosecution evidence, the statements of the accused recorded under S. 164, Criminal P. C., and the circumstances in which they were made may be mentioned. It will be remembered that the occurrence took place on the night between the 8th and 9th August 1945. It so happened that the two accused along with P. W. 9, Jamal Uddin, left Dehra Dun for Saharanpur on the afternoon of 8th August for some business by a car which belonged to Jamal Uddin. On their way back they visited Roorkee. They started from there at about 8.30 P.M. The distance between Roorkee and Dehra Dun is 40 miles. They were delayed on the way on account of a puncture. There was a forest on the way and the party had in mind when they started from Dehra Dun to do some shooting if an animal was found. Jagmohan had, therefore, taken his gun with him. When the party on its way back reached near the Mohand pass, Ravi fired two shots from the car at what he considered to be an animal but thinking that his shots had missed, the party did not stop and proceeded by the car. They reached Dehra Dun at about 4 a.m. The party

took no action on 9th August in the way of any information to the police probably because they thought that nothing untoward had happened as a result of the firing. At about 11.30 p.m. on 9th August one Darrick who is the manager of the Green Hotel informed Jagmohan that a Circle Inspector of Police who had come to the hotel to dine was mentioning that an incident had taken place on the previous night near the Mohand pass as a result of which a British Officer and a British soldier had received gun-shot wounds. On hearing this it occurred to Jagmohan that it might have been caused by the gun-shots fired by Ravi. So on the following morning he consulted P. W. 4, Khurshed Lal, Vakil and also a relation of his; the latter advised Jagmohan to go to the Superintendent of Police and state to him frankly and straightforwardly what had happened. Jagmohan followed this advice. He along with Ravi and Jamal Uddin were then examined under S. 164 by P. W. 5, Mr. Bokhari, a Magistrate First Class. Exhibits P-9, P-10 and P-17 are their statements under S. 164.

[6] The prosecution examined twelve witnesses before the learned Assistant Sessions Judge and tendered the medical evidence of Major Griffiths, Captain Gibson and Captain Lahiry. The evidence of Captain Christie recorded before the committing Magistrate was also admitted in evidence under Section 33 of the Evidence Act as at the time of the evidence in the Court of Session he had left for England. Thus there was in all the evidence of sixteen witnesses for the prosecution. The first remarkable feature of the case is that the only witness who can give definite, direct evidence about the charges framed against the accused is P. W. 9, Jamal Uddin. This witness does not at all support the case against the accused. He does not say that Fusilier Spence and Captain Wright were injured by Ravi. He says that Ravi fired at what he considered to be an animal and that he did not see or hear any man after the shots had been fired. Further he locates the place at which Ravi fired the shots differently from that fixed by Captain Wright and other prosecution witnesses. According to Jamal Uddin these shots were fired at a distance of about  $3\frac{1}{4}$  furlongs or 733 yards from the temple near the Mohand pass. The temple itself is at a distance of 30 or 40 yards from the tunnel. Captain Wright, however, locates the place from which the gun shots were fired at about 150 or 200 yards from the temple near the tunnel. The learned Assistant Sessions Judge remarks that Jamal Uddin being a friend of the accused is supporting them. It may or may not be so, but the fact remains that Jamal Uddin's evidence does not help the prosecution



case. On the other hand, it helps the defence story.

[7] The case against the accused thus rests entirely on circumstantial evidence. It is a well-established principle of law that an accused can be convicted on circumstantial evidence only when such evidence is quite incompatible with his innocence and there can be a reasonable certainty of his guilt. I am of opinion that judged by this standard the evidence adduced by the prosecution cannot be said to prove the case against the accused. Learned counsel for the Crown has argued that at least Ravi accused can be convicted on his statement under S. 164, Criminal P. C. In fact he goes so far as even to suggest that the statement amounts to a confession. As regards Jagmohan he has frankly stated that no case against him is made out. The gun was lying loaded on the seat of the car. Jagmohan himself was driving it and he had intended to do the shooting himself but upon sighting an animal Ravi suddenly took up the gun and fired it. Thereupon Jagmohan rebuked him. Certainly this cannot be said to be an abetment on his part; nor can he be said to have committed the offence under S. 21, Arms Act. The case against Jagmohan has thus no legs to stand. I shall, therefore, confine myself now to the case against Ravi alone.

[8] I entirely disagree with learned counsel for the Crown that Ravi's statement under S. 164 amounts to a confession. He nowhere admits that his shots hit Fusilier Spence and Captain Wright. He says that he saw the eyes of an animal and he fired at it. He thought that he had missed it and he did not see the animal falling down. He added in his statement before the committing Magistrate that he had fired the shots about half a mile from the tunnel towards Saharanpur. He did not admit that the shots were fired at the time at which Fusilier Spence and Captain Wright received the gun shot wounds. He adhered to that statement in his examination before the committing Magistrate and the learned Assistant Sessions Judge. Now what is the evidence against Ravi? [His Lordship discussed the evidence of the witnesses for the prosecution and concluded:]

[8A] To sum up, the position is that there is no direct evidence that the unfortunate injuries to Captain Wright and Fusilier Spence were caused by Ravi's gun shots. The circumstantial evidence against him is not such as can eliminate all reasonable doubts of his innocence. The learned Assistant Sessions Judge relies upon the following circumstances against the accused: (1) The time at which Captain Wright and Fusilier Spence received the gun-shot wounds is about the same as the one at which the accused would according to the prosecution evidence, have passed by the

scene of the occurrence. (2) The conduct of the accused. (3) The facts that the pellet extracted from the body of Fusilier Spence is one which is ordinarily used in L. G. cartridges and two such unused cartridges were recovered from the accused. (4) The identity of the car. (5) Ravi accused who was a novice and had not handled the gun prior to the night of the occurrence was rash and negligent in firing from a moving car in a jungle without the help of any light.

[9] All these circumstances are capable of reasonable explanation. [After stating how these circumstances can be explained his Lordship proceeded.] Lastly, even if it be assumed that the gun shots were fired by Ravi from Jamal Uddin's car, the question still remains whether or not this amounted to a rash and negligent act on his part. In 3 ALL. 776,<sup>2</sup> it was observed:

"That criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. Criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted."

Now what was the position in the present case? It was a pitched dark night. There is nothing on the record to show that there was any caution or signal to warn people that any military exercise was going on near the Mohand pass. Questioned by the Court Jamal Uddin stated that when going from Dehra Dun to Saharanpur at about 4.15 p. m. on 8-8-1945, he did not see any military camp near the Mohand pass; nor did he see any such Military party when returning from Saharanpur. The place where the occurrence took place was a forest and there could reasonably be no suspicion in the mind of Ravi accused that any human being was at the place where he was firing. If a person in his zeal to try his hand at shooting fires a gun in a jungle at a late hour of the night at a place where no human being can be suspected to be present at what he considers to be an animal, he cannot be said to be guilty of a rash and negligent act. If he mistook something else as an animal, then S. 79, Penal Code, comes to his rescue. There is a peculiar feature in this case. While Ravi accused does not say that he fired the shot in the light of the torch, the prosecution witnesses suggest that the shots were fired in the light of the head lamps and of the torch. The learned Assistant Sessions Judge has held that the gun was fired



in darkness and that there was no light of the head lamps or of the torch. If it was so, then certainly Captain Wright and Fusilier Spence were not shot by Ravi because, according to Captain Wright, the shots hit him when the whole scene was illumined by the head lights of the car.

[10] In this state of the evidence, if the jury returned a verdict of not guilty under S. 304A and 337, Penal Code, it cannot be said to be unreasonable or wrong, what to speak of its being perverse or impossible. When in a case two reasonable views are possible and the jury takes one such view, the High Court will not interfere with it, especially when it is a unanimous verdict. It appears from the record that the jurors applied their mind fully to the case. They took one hour and twenty minutes to consider their verdict. After the verdict was given the learned Judge asked the jury to give their reasons and they submitted the same then and there in writing. A perusal of the reasons given by them will show that the jurors are not illiterate persons. They appear to be men of ordinary commonsense capable of forming their opinions on reasonable grounds. I may remark here that the procedure adopted by the learned Judge in asking the jury to give their reasons in writing is not one which can be approved of. The law nowhere requires the jury to give reasons for the verdict. Under sub-s. (1) of S. 303, Criminal P. C., the Judge can ask the jury only such questions as are necessary to ascertain what their verdict is. This does not mean that they can be asked to give their reasons. The jury are not trained judges and to ask them to give their reasons in writing or in other words to ask them to write a judgment is a procedure which is likely to put them in an awkward position. I would, therefore, express my disapproval with the procedure adopted by the learned Assistant Sessions Judge.

[11] Learned counsel for the accused has relied upon 2 A.L.J. 475<sup>3</sup> in which it was held that the mere fact that upon a consideration of all the evidence a Judge would have arrived at a conclusion different from that arrived at by the jury would not justify the Court in interfering with their unanimous verdict. In that case this Court declined to interfere with the verdict on the ground that it was not perverse. In 46 ALL. 265<sup>4</sup> also it was held that the High Court should interfere only when a jury has arrived at a verdict which is perverse or clearly and manifestly wrong. Learned counsel for the Crown relies upon the Full Bench case in 50 ALL. 625<sup>5</sup> in which it was held that where a jury has given its verdict on the facts of the case it is open to the High Court to

revise that verdict on a reference by the trial Judge made under S. 307, Criminal P. C., even where it is not alleged that there has been any misdirection by the Judge or any misunderstanding by the jury of the law as laid down by the Judge. It will be seen that this case does not overrule the principles laid down in 2 A.L.J. 475<sup>3</sup> or 46 ALL. 265<sup>4</sup>. The Court was concerned in that case about the powers of the High Court on hearing a reference under S. 307, Criminal P. C. In subsequent cases which came up before this Court 2 A.L.J. 475<sup>3</sup> was followed and it was held that 50 ALL. 625<sup>5</sup> was no authority for departure from the principles laid down in 2 A.L.J. 475<sup>3</sup>, *vide* 1931 A.L.J. 695.<sup>6</sup> In I. L. R. 1938 ALL. 483,<sup>7</sup> it was held after considering the case in 50 ALL. 625<sup>5</sup> that in cases where there has been a verdict of not guilty it was the practice of this Court and also of other High Courts not to reverse the verdict of a jury unless it was perverse or manifestly wrong. On the other hand, where the jury had returned the verdict of guilty, the matter stood on a different footing. It was further observed that the verdict of a jury, especially when it is unanimous, should not be lightly displaced. It cannot be said that the evidence in this case before us is of such a character that a verdict of not guilty passed by the jury is demonstrably wrong. I see no good reason to upset the verdict of not guilty given by the jury.

[12] Learned counsel for the accused has argued that an offence under S. 19 (f), Arms Act is not made out against Ravi. Section 19 (f) provides that whoever has in his possession or under his control any arms or ammunition in contravention of the provisions of S. 14 or S. 15 shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both. Sections 14 and 15 in essence provide that no person shall have in his possession or under his control any firearms or any ammunition. It is amply proved that Ravi had no licence for the gun. It is admitted that he took hold of Jagmohan's gun and fired it. Though the possession was for a very short time, nevertheless he committed an offence under S. 19 (f). 23 A.L.J. 356<sup>8</sup> has been relied upon on his behalf. The facts of that case are distinguishable from those of the present one. In a communal riot taking place in different parts of a town the accused in that case took up the gun of his brother who was a licence-holder and fired shots in the air so that people mischievously inclined might know that it was not safe for them to do any mischief to the people living in the house. It was held that no offence had been committed by the applicant. It was observed in that case while discussing the question of possession, that



if a servant takes out the gun without the permission of his master and commits an offence with it, or goes out for a mere show in a marriage procession, his possession would be unlawful. I am of opinion that the ruling is not applicable to the facts of the present case. I am of opinion that the case under S. 19 (f), Arms Act is clearly made out against Ravi. The sentence passed by the learned Judge does not err on the side of severity.

[13] It was also argued on behalf of Ravi that the provisions of U. P. First Offenders 'Probation Act, 1938, should be applied to the present case. Section 3 of that Act is not applicable because the offence under S. 19 (f) of Arms Act is punishable with more than two years' imprisonment. Section 4, however, can be applicable, but I do not think that in the circumstances of the case it is one in which it should be applied.

[14] Lastly it was argued on behalf of the defence that this reference is not competent because the learned Assistant Sessions Judge, having pronounced his judgment in respect of the charge under S. 19 (f), Arms Act, could not refer the remaining portion of the case to this Court and in this connection we are referred to A. I. R. 1933 Cal. 665,<sup>9</sup> 11 Pat. 395<sup>10</sup> and 14 Pat. 717.<sup>11</sup> No doubt these three cases do support the contention of learned counsel for the defence, but against these authorities we have the case of our own High Court in 52 ALL. 881.<sup>1</sup> It is urged that in this case the point of incompetency of reference was not raised before the learned Judges and so it was not considered by them. It is unnecessary to discuss the view taken in the Calcutta and the Patna cases, because I have arrived at the conclusion that in the present case there are no grounds whatsoever for interference with the verdict of the jury. Further as already stated the procedure adopted in 52 ALL. 881<sup>1</sup> by this Court should be followed in this case.

[15] For the reasons given above, I would reject the reference, accept the verdict of the jury, set aside the judgment and the sentence passed by the learned Assistant Sessions Judge, convict Ravi accused under S. 19 (f), Arms Act, sentence him to a fine of Rs. 200 only and in default to undergo a simple imprisonment of three months and acquit Ravi of the offences under Ss. 304A and 337, Penal Code and Jagmohan of the offences under Ss. 304A and 337, read with S. 109, Penal Code and S. 21, Arms Act.

**Verma J.**—I agree and do not consider it necessary to add anything.

**Per Curiam.**—The recommendation made by the learned Judge below is rejected and the

verdict of "Not Guilty" delivered by the jury with regard to the offences under Ss. 304A and 337, Penal Code with which Ravi Thukral was charged and the offences under Ss. 304A and 337 read with S. 109, Penal Code and under S. 21, Arms Act with which Jagmohan Thukral was charged is upheld. Ravi Thukral and Jagmohan Thukral are acquitted of the offences mentioned above. The judgment of conviction under S. 19 (f), Arms Act recorded by the Court below and the sentence passed by it in respect thereof are set aside. Ravi Thukral is now convicted by this Court under S. 19 (f), Arms Act and is sentenced to a fine of Rs. 200 only. In case of default in the payment of the fine, Ravi Thukral will undergo simple imprisonment for three months.

V.S.B.

*Order accordingly.*

**A. I. R. (34) 1947 Allahabad 104 [C. N. 55]**

ALLSOP AG. C. J. AND MATHUR J.

*Jwala Bank Ltd., Benares and others v. Sheobodh Chandra Banerji and others.*

Misc. Case No. 110 of 1944, De'd on 1-4-1946, reference made by Chief Inspector of Stamps, D/- 18-2-1944.

Stamp Act (1899), Art. 55—Deed of surrender by Hindu widow in favour of next reversioners is not gift — Stamp as release deed is enough — Stamp Act (1899), Art. 33.

A document whereby a Hindu widow surrenders her life interest in her husband's property in favour of the next reversioners is not liable to stamp duty as a gift or conveyance or a transfer of any kind. It is enough if it is stamped as a release : ('38) 25 A. I. R. 1938 Pat 33 (F. B.), *Dissent*. [Para 1]

Stamp Act. —

('45-Com) Art. 33, N. 2, Pt. 2; Art. 55, N. 2, Pts. 2 to 4.

*Brijlal Gupta* — for the Crown.

*Case referred :—*

1. ('38) 25 A. I. R. 1938 Pat. 33 : 17 Pat 95 : 172 I. C. 847 (F. B.), *In re Khetramoni Debya*.

**Allsop Ag. C. J.**—A Hindu widow executed a document by which she surrendered her life interest in her husband's property in favour of the next reversioners, her three daughters. The document was stamped as a release. It is contended by the Chief Inspector of Stamps that the document was a gift. Reference has been made to the case of A. I. R. 1938 Pat. 33.<sup>1</sup> With the greatest respect to the learned Judges of the Patna High Court, we do not think that their decision is correct. If the transaction with which we are concerned was a gift or for that matter a conveyance or transfer, the three daughters benefited by it would stand in the shoes of the Hindu widow who executed the document or in other words, they would have a life interest during the lifetime of the Hindu widow. But that is not the position at all. When a Hindu widow surrenders her life interest in the property in



favour of the reversioners who are in existence at that time those reversioners become the absolute owners and they do not hold the Hindu widow's life interest during her lifetime. If they did, and they happened to die before the widow, then the property would go to the reversioners who were alive at the time of the widow's death. In our judgment, this document with which we are concerned is certainly not a gift or a conveyance or a transfer of any kind. It is a mistake to go into the question whether it comes within the terms of the definition of the word "release" in the Indian Stamp Act, 1899. If it does not come under that definition, then presumably, it is agreement upon which a smaller amount of fee would be payable. We are quite clear that this document is not to be stamped as a gift or transfer of any kind, or a conveyance, and that it is at least sufficiently stamped.

V. R. *Order accordingly.*

**A. I. R. (34) 1947 Allahabad 105 [C. N. 56]**

IQBAL AHMAD C. J. AND BRAUND J.

*Raj Bahadur and another—Applicants v. Emperor.*

Criminal Revn. Nos. 1331 and 1333 of 1945 and 39 of 1946, Decided on 9-5-1946, from order of Sessions Judge, Agra, D/- 10-10-1945.

(a) Sugar and Sugar Products Control Order, 1943, Cl. 8 (1) — Clause only prohibits offer and acceptance of sugar for transport and not transport of sugar itself — Lorry driver carrying sugar without permit — No authority to driver for accepting goods for transport — Conviction of driver under Cl. 8 read with R. 81 (4) of Defence of India Rules is illegal.

Clause 8 of the Sugar and Sugar Products Control order deals with offer and acceptance of sugar for transport and not with the transport of sugar itself. A mere mechanic like a motor driver whose duty it is to drive a vehicle to whatever place he is told to drive it and to carry whatever he is told to carry, is not a person who is in a position to infringe Cl. 8 of the Order unless it is affirmatively proved that he was also in a position to accept goods for transport. Since such a person is not himself in a position to infringe Cl. 8, it follows that he cannot also abet the infringement of it by another person. A conviction of such a person under R. 81 (4), Defence of India Rules, 1939 is illegal and must be set aside. [Paras 5 and 8]

(b) Defence of India Rules (1939), R. 119 — Order published in Official Gazette — Manner of publication of Order should be presumed to have been considered as sufficient by authority concerned — Evidence Act (1872), S. 114.

Rule 119, Defence of India Rules no doubt throws upon the authority making the Order not only the right but also the duty of forming an opinion as to the best manner of publication. But the authority concerned need not in terms say that he on behalf of the Government of India had considered the matter and had formed an opinion that publication in the Gazette was the best method of informing the public of the contents of the Order. Once the act of publication itself has been proved, it should in conformity with S. 114, Evidence

Act, be presumed that the official process of considering and forming an opinion as to the best method of publication has been regularly performed. So long as the principle of *omnia rite esse acta* stands, it can be no answer to say that there is a possibility that the process of forming an opinion *might* have been omitted and the publication *might* in fact be due to mere office routine. The very purpose of S. 114 is that it shall be assumed that the authority charged with a duty has performed it: 33 A. I. R. 1946 Pat. 1 (F. B.), *Foll.*; 32 A. I. R. 1945 All. 291; 32 A. I. R. 1945 All. 280 and 33 A. I. R. 1946 All. 223, *Not followed*.

[Para 14]

*B. S. Darbari, Shiv Charan Lal, H. K. Mahmood and D. D. Seth* — for Applicants.

*Deputy Government Advocate*—for the Crown.

**Braund J.** — These are three criminal revisions referred to us as a Bench as they were considered to raise a point of considerable importance arising out of the Defence of India Rules and the Orders made thereunder. We propose in this judgment to deal primarily with Revn. No. 1331 of 1945, since the other cases will be governed by the view we take in this revision.

[2] The facts are very short and have been set out at some length in the judgments both of the Magistrate and the Sessions Judge of Agra who have dealt with the case in the Courts below. It appears that at about one in the early morning of 20-1-1945 two motor trucks were stopped by the police at the Bayara Canal bridge on the Agra-Bharatpur Road. This bridge is a trifle over a mile from the Bharatpur boundary and is about nineteen miles from Agra and some three miles from the village or small town of Achenera, where there is a police station. The police of Achenera had received previous information that there would be an attempt to "run" sugar and potatoes on that night from the Agra district into the Bharatpur State, both such commodities being prohibited for transport and export. The facts are no longer in dispute in this revision and it is sufficient to say that in due course at about one in the morning the first of the two lorries arrived at the point near the Bayara Canal bridge at which the police party was waiting. The police had placed an obstacle of stones on the road and the lorry was accordingly brought to a standstill. Four people were found on it. The first was the present applicant, Raj Bahadur, who was actually the driver of the lorry. The second was Hari Ram, who is the other of the applicants in this revision, who was the owner of the fifty bags of sugar which the lorry was found to contain. The other two occupants, who have been acquitted and with whom we are no longer concerned, were the assistant driver or spare man and another person called Narain Singh who was a passenger and may possibly have been a part owner of the truck. We are now actually only concerned with Raj



Bahadur, the driver, and Hari Ram, the owner of the sugar.

[3] Those are the facts and they may now be taken to be established. These two men were in due course charged in respect of two separate offences. The first offence was an alleged offence under cl. 8 (1), Sugar and Sugar Products Control Order, 1943. The second of the two offences with which they were each charged was under cl. 6 of the District Magistrate of Agra's order known as "The Agra Khandsari Sugar Export Control Order 1944."

[4] The Sugar and Sugar Products Control Order, 1943 is a Government of India Order made in pursuance of R. 81 (2) (a), Defence of India Rules, which itself was made in pursuance of S. 2 (1), Defence of India Act, 1939. This order (which we shall hereinafter refer to in short as the "Sugar Control Order") was published in the Gazette of India of 3-7-1943 over the signature of Major-General E. Wood, who was then the Secretary of the Government of India in its Department of Food. By cl. 8 (1), Sugar Control Order it was provided :

"No sugar shall, after such date as the controller may notify in this behalf, *be offered for transport* by railway or in any manner whatsoever by land or river by a consignor or *accepted by* a railway servant or by any person whatsoever *for transport* except under a permit issued by the controller in such form and subject to such conditions and in respect of such areas as he may from time to time prescribe . . . ."

[5] The words in italics above are, of course, our own. They have been emphasised in order to show that what this clause aims at is to prevent merely the offering and accepting for transport of sugar, as distinct from the physical movement of sugar, which, as we shall see in a moment, has been left to be dealt with by the Magistrate's Order referred to above. Clause 8, Sugar Control Order itself, therefore, only deals with what may be described as the offer and the acceptance of sugar *for transport*, and not with the transport of sugar itself. That is one of the two control orders that the applicants in this case have been said to have contravened.

[6] The other of the two control provisions relating to sugar alleged to have been infringed by the applicants was the Agra Khandsari Sugar Export Control Order 1944, made by the District Magistrate of Agra on 15-4-1944 also under R. 81 (2) (a), Defence of India Rules. That order (which we shall hereinafter refer to as the "Magistrate's order") provided that no person should "take or cause to be taken by road Khandsari sugar to a prohibited area"—Bharatpur may be taken for this purpose to have been a prohibited area—"without a permit from the District Supply Officer or the Additional District Supply Officer, Agra . . . .". Clause 5 of the Magistrate's

order went on to provide that the order itself was to be published in any one or more of the following ways, that is to say, by publication in the Agra District War Bulletin; or by announcement by beat of drum; or by a copy thereof being affixed on the notice boards of various specified officials of the Agra district. That was the other of the two regulations which the present applicants were said to have broken and in respect of which they were charged under R. 81 (4), Defence of India Rules. It is obvious that the Magistrate's order deals with something quite different from the Sugar Control Order. The latter, as we have already pointed out, deals merely with the offer and acceptance for transport, while it will be seen that the former deals actually with the physical movement of the sugar itself. It is important to observe this distinction, as it seems to us to have been completely lost sight of by those who have dealt with the cases.

[7] The two applicants were in due course tried and convicted on both charges by the Magistrate of the First Class, Agra on 11-7-1945. The applicant Raj Bahadur was sentenced to undergo four months' rigorous imprisonment, while the applicant Hari Ram was sentenced to undergo six months' rigorous imprisonment on each count such sentences to run concurrently. The stocks of sugar seized from the lorry were also confiscated. They appealed to the Sessions Judge of Agra and he duly dismissed their appeals. On the matter being brought on revision to this Court, a learned Single Judge has referred the matter to a Bench solely on the question whether the publication of the various controls was sufficient.

[8] It is only in respect of the conviction of the two applicants in respect of the offence under the Sugar Control Order, read with R. 121, Defence of India Rules, that this revision has been pressed before us. As to the applicant Raj Bahadur, we feel it right to say, although this point was not taken by the learned advocate who appeared for him before us, that in any case it does not seem to us, apart from any question as to the publication of the Sugar Control Order, that his conviction can stand. This applicant was merely the driver of the lorry. He was not its owner and there is no evidence that he had any further concern with the lorry and what it carried than to drive it. He was not, as far as we know, entitled to say what it should carry or to accept or refuse goods for carriage. He was in short a mere driver of the lorry. We have already been at some pains to point out that what clause 8 of the Sugar Control Order prohibits is, not to transport sugar, but the "offering" of it for transport, by one party on the one



hand and the "accepting" of it for transport by the other party on the other hand. It has nothing to do with the physical transport of sugar in the sense of its actual movement from one place to another. Nor is the clause confined to the offer and acceptance of sugar for transport to a place outside the Province or district in question. It is a general prohibition against making of or accepting an agreement to transport sugar anywhere. It seems to us obvious on the slightest consideration that a mere mechanic whose duty it is to drive a vehicle to whatever place he is told to drive it and to carry whatever he is told to carry is not a person who is in a position to infringe clause 8 of the Sugar Control Order unless it is affirmatively shown that he was also in a position to accept goods for transport. Raj Bahadur in this case had, as far as we know, no such authority. The lorry was owned by others. There is no evidence that he was in any way concerned with the arrangement to carry sugar. He merely drove the lorry. As far as we can see, he neither offered nor accepted sugar for transport. The case against the second applicant, Hari Ram, may, of course, well be different, since he was the owner of the sugar in question and can be properly said to have been in a position to offer it for transport. If, as we think, Raj Bahadur was not himself in a position to infringe clause 8 of the Sugar Control Order, it follows that he was not in a position to abet the infringement of it by Hari Ram. There is not an iota of evidence that he was even cognizant of the arrangement between Hari Ram and the owners of the lorry to carry it to Bharatpur.

[9] For these reasons alone we think that the applicant, Raj Bahadur will have to be acquitted of the offence under R. 81 (4), Defence of India Rules in respect of any infringement of clause 8 of the Sugar Control Order. We feel it necessary, however, to go further and to consider, if only in the case of the applicant Hari Ram, the further contention which has been raised before us that no such publication of the Sugar Control Order has been proved as will satisfy R. 119, Defence of India Rules.

[10] The argument advanced is, it is true, said to be supported by a number of decisions of Single Judges of this Court. It is, we understand, to the effect that the fact of publication in the Gazette does not by itself satisfy R. 119, Defence of India Rules, since mere publication by itself is no proof of the fact that the authority, officer or person making the publication had ever formed the opinion that the particular form of publication was in the circumstances the best adapted for informing the persons whom the order concerns. It is suggested that the act of publication in the Gazette is by itself

an equivocal act and may as well be the result of some secretariat routine as the result of any consideration what the best means of informing the persons concerned may be. This view of the matter has been favoured by certain Judges of this Court. In [*Girdhari v. Emperor*] 1945 A. L. J. 182,<sup>1</sup> Mulla J. took the view that it could not be presumed in that case that the persons before him had any knowledge of an order under the Defence of India Rules, since there was nothing on the record to show that the District Magistrate had himself considered how the order was to be published. In a later case [*Krishna Chandra v. Emperor*] 1945 A. L. J. 357,<sup>2</sup> the same learned Judge went a little further and said that the most important ingredient in Rule 119, was that the authority passing the order should exercise its mind and decide upon the method of publication of the order. He meant, we think, that it was necessary for the prosecution to prove affirmatively that the authority had positively considered the question of publication and had come to a positive conclusion that the method adopted was the best method in the circumstances. He said :

"This power cannot be exercised by anyone other than the authority passing the order. Before a person can be charged with infringement of an order passed under the Defence of India Rules, it is incumbent on the prosecution to establish that the authority passing that order had prescribed a certain method of publishing that order and that method had been carried out. . . ."

[11] To the same effect is the judgment of Wali Ullah J. in [*Akbar v. Emperor*] 1945 A. L. J. 499.<sup>3</sup> In that case the learned Judge observed:

... "From the mere fact of notification of the Control Order in the U. P. Gazette it does not at all appear that the authority responsible for making the order ever directed its mind to the consideration of the question as to the manner best adapted for informing the persons whom the Order concerns. . . . The provisions of the Rule to my mind necessitate proof of two matters : (1) It must be shown that the authority making the Order — in this case the Provincial Government — indicated some manner, which in its opinion was considered best adapted for informing "the persons concerned and (2) that such direction given by the authority concerned was actually carried out. . . ."

[12] That view was in effect the same view as had previously been expressed by Mulla J.

[13] We regret that we find it difficult to share the opinion of these learned Judges. The language of R. 119, Defence of India Rules is that:

"Save as otherwise expressly provided in these Rules, every authority, officer or person who makes any order

1. ('45) 32 A. I. R. 1945 All. 291; I. L. R. (1945) All. 531; 221 I. C. 134; 1945 A. L. J. 182.

2. ('45) 32 A. I. R. 1945 All. 280; I. L. R. (1945) All. 682; 221 I. C. 302; 1945 A. L. J. 357.

3. ('46) 33 A. I. R. 1946 All. 223; 224 I. C. 76; 1945 A. L. J. 499.



in writing in pursuance of any of these Rules shall, in the case of an order of a general nature or affecting a class of persons, publish notice of such order in such manner as may, in the opinion of such authority, officer or person, be best adapted for informing persons whom the order concerns."

[14] The Rule, therefore, throws upon the authority making the order not only the right but also the duty of forming an opinion as to the best manner of publication. In the present case, and in those before the other Judges referred to above, all that was known was that the authority had in fact made publication. In the present case the publication was by notification in the Gazette. That notification was signed by the Secretary of the Department of the Government of India to which the matter related and we have no doubt, therefore, that it was in fact the notification of the Government of India, which was itself the authority which made the Sugar Control Order. So far there is no difficulty. The Secretary of the Food Department, however, did not in terms say that he on behalf of the Government of India had considered the matter and had formed the opinion that publication in the Gazette was the best method of informing the public of the contents of the order. But, in our view, it will be opposed both to principle and common sense if he were to be required to do anything of the kind. If a principle were to be introduced that, wherever, by statute or rule, a discretion is reposed in any person to do an act, he had to prove affirmatively his mental processes in exercising discretion, it would lead to impossible results. Nor is it in accordance with well accepted legal principles. We think that the true principle is to be found in the well known legal maxim "*omnia rite esse acta*," which is the foundation of S. 114, Evidence Act. That section of the Evidence Act gives specifically as an illustration that a Court may presume that official acts have been regularly performed. What is the process enjoined under R. 119, Defence of India Rules but an official act? We have great difficulty in understanding why, once the act of publication itself has been proved, it should *not*, in conformity with S. 114, Evidence Act, be presumed that the official process of considering and forming an opinion as to the best method of publication has been regularly performed. So long as the principle of *omnia rite esse acta* stands, it can be no answer to say that there is a possibility that the process of forming an opinion *might* have been omitted and the publication *might* in fact be due to mere office routine. The very purpose of S. 114 is that it shall be assumed that the authority charged with a duty has performed it and, as we see it, the adoption of the view that has been previously expressed in the cases to

which we have already referred would mean the reverse presumption, namely that, in the absence of proof, it has to be assumed that he has not performed it.

[15] In a still more recent case in the Patna High Court [*Mahadeo Prasad Jayaswal v. Emperor*] A. I. R. 1946 Pat. 1,<sup>4</sup> five learned Judges of that Court have considered this question and have come to the conclusion that, where an order passed by the authority has been published by it in the official Gazette, it may be presumed that it was aware of the provisions of R. 119, Defence of India Rules, and that the publication in the Gazette was made in considered compliance with all its provisions, including the provision as to the determination of the most suitable form of publication. With great respect, we think that this is the right view both as a matter of legal principle and as a matter of common sense. There is nothing in R. 119 which required the authority to set out what its opinion was or how it was arrived at. On ordinary principles, a man must be assumed to have intended—i. e. to have considered—that which he does. The fact that he does not declare his reasons is no evidence to the contrary. There is nothing to prevent any aggrieved party challenging the method of publication if he is prepared affirmatively to show that it was not the result of any bona fide consideration at all. But that is a long way from saying that it has in the first place to be assumed that the de facto publication was not the result of the consideration contemplated by R. 119. For the reasons we have expressed above we think that so to hold will be opposed to well-known legal principles. For these reasons with deference we accept the view expressed by the recent Full Bench of the Patna High Court.

[16] In the result, therefore, as regards Revision No. 1331 of 1945, it must in respect to the applicant Raj Bahadur be allowed so far as his conviction under R. 81 (4), Defence of India Rules in respect of clause 8 (1) of the Sugar Control Order is concerned and his sentence on that conviction must be set aside. So far, however, as the conviction and sentence of Raj Bahadur under the Magistrate's order, and so far as the convictions and sentences of the applicant Hari Ram in respect of both the Sugar Control Order and the Magistrate's order are concerned, we think that this revision application falls to be dismissed. We have been asked to reconsider their sentences principally in view of the fact that the Defence of India Rules and Control Orders made thereunder have come, or are about to come, to an end. In our opinion that

4. (1946) 33 A. I. R. 1946 Pat. 1: 24 Pat. 781: 223 I. C. 263 (F.B.).



does not affect the matter and we think that the sentences were in the first place by no means severe, even when the confiscation of the sugar is taken into account.

[17] As regards the other two revisions before us, they are covered in principle by the judgment we have just delivered in Revision No. 1331 and we accordingly direct that they be dismissed. The respective applicants must now surrender to their bail.

K.S.

*Order accordingly.*

**A. I. R. (34) 1947 Allahabad 109 [C. N. 57]**

SINHA AND MANSUR ALAM JJ.

*Baij Nath and others — Applicants v. Emperor.*

Cri. Revn. Nos. 1269, 1270 to 1282 and Crim. Ref. No. 1345 of 1945, De'd on 25-7-1946.

Defence of India Rules (1939), R. 119 — To make person liable for contravention of order under R. 81 proof of receipt of information by him is necessary — Mere publication of Order in Gazette is not sufficient.

Since the object of publication of an order under R. 81 is to inform persons to whom the order concerns, mere publication of the order in the Gazette though done in the manner prescribed is not sufficient. In order to make a person liable for contravention of such order it must be proved that the particular Gazette reached him and conveyed the necessary information. Once this is established it is not open to take objection to the manner or method in which the information was conveyed. But the receipt of the information by him is a *sine qua non* : 34 A. I. R. 1947 All. 105, Ref. [Para 8]

G. S. Pathak, S. B. L. Gour, Shri Rama Shiv Charan Lal, B. N. Misra and Harish Chandra Sharma — for Applicants.

Deputy Government Advocate — for the Crown.

Cases referred :—

1. (1918) 1 K. B. 101 : 87 L. J. K. B. 122 : 118 L. T. 95, Johnson v. Sargant & Sons.
2. ('47) 34 A. I. R. 1947 All. 105, Emperor v. Raj Bahadur.

**Sinha J.** — These are twelve cases in all, but the facts are, in all essentials, almost common. The applicants are grain dealers in the district of Agra in villages Midhakur and Kiraoli on the B. B. & C. I. Railway. On various dates between 28th April and 2nd May, 1943 they booked consignments of *arhar* to various places in the province of Bengal. The first transaction took place on 27-4-1943. It was entered into by one Baij Nath and forms the subject-matter of Criminal Revision No. 1278 of 1945. The other by Badri Prasad is to be considered in Criminal Revision No. 1272. On 28-4-1943, there were four transactions, two by Baij Nath, one by Bhagwan Das and the fourth by Babu Lal. The one by Babu Lal forms the subject-matter of Criminal Revision No. 1270, by Bhagwan Das of Criminal Revision No. 1279 and the two by Baij Nath of Criminal Revision Nos. 1280 and 1281. It might be mentioned that Criminal Revision No. 1280 deals with two transactions — One of 28-4-1943

and the other of 2-5-1943. On the third day came into existence three transactions which form the subject-matter of Criminal Revision No. 1271 by Harjiwan Das, 1275 which also concerns a transaction of 2-5-1943, by Roshan Lal, and 1276, by Baij Nath once again. The 1st of May 1943 witnessed another transaction which forms the subject matter of Criminal Revision No. 1273 of 1945 by Basant Lal. We have mentioned a few of the transactions which came into existence on 2nd May. There is yet one more which came into being on this date and with which is concerned Criminal Revision No. 1274 of 1945 by Dwarka Prasad.

[2] On 20-3-1943, the U. P. Foodgrains (Movement) Control Order was passed by His Excellency the Governor. This order prohibited the export of *arhar* from these Provinces. On 21-4-1943, another order was passed by him, and it is the effect of this order which falls to be considered. Like its predecessor, it is also styled as "The U. P. Foodgrains (Movement) Control Order, 1943," and was passed in exercise of the powers conferred by R. 81, Defence of India Rules. But it differs from its predecessor in one important particular. The first was passed on 20-3-1943, but was to come into force from 25-3-1943. The order of 21-4-1943, was, on the other hand, "to come into force at once." It, if anything, indicates that the authority concerned was anxious to see that its operation was not to be delayed. Not only that, care was taken to provide that the previous order "is hereby cancelled."

[3] What, therefore, has to be considered is whether the transactions in dispute fall within the mischief of both, or either, or neither, of these orders. Mr. Bannerji, the learned counsel for some of the applicants, contends, and his contention is adopted by the other counsel representing the rest of the applicants, that the effect of the succeeding order is to wipe out the preceding order the moment it was passed. This contention is, as said above, amply borne out by the language of the order of 21-4-1943. When precisely it came into force is yet another matter which demands consideration, but no language could be more explicit or emphatic than the one employed and which could show more clearly that it was the intention of the author of the order that it should come into effect immediately. Whether it *did* or *could* depends not only upon such an intention, but upon yet another provision. This interpretation receives countenance from the definition of the word "commencement" in S. 3, cl. 12, General Clauses Act (Act X [10] of 1879) according to which "commencement used with reference to an Act or Regulation, shall mean the day on which the Act or Regulation comes into force."



[4] The learned Crown counsel contends that law abhors vacuum, and, if the effect of the succeeding order is to wipe out the previous order immediately, it must also be deemed to come into force simultaneously. This would be normally so, but the authority concerned was alive to the extraordinary situation created by these orders coming into being in quick succession. It, therefore, issued a notification that "this excludes the normal rule that ignorance of the law is no defence."

[5] It has come into evidence, and, indeed, it has not been denied by the learned Crown counsel, that the publication in the Gazette was made on 1st May, it was received in the town of Agra on 3rd, and at the particular railway station on 5-5-1943. One of the witnesses in one of the twelve cases was Ram Gopal, the station master of Midhakur, who conceded that he obtained information of this order when he received the Gazette on 5th May and not earlier. It is, therefore, obvious that the transactions between 27th April and at least up to 30-4-1943, are not affected by the notification of either of the two orders, that is the order of 20th of March or of 21-4-1943.

[6] There remain the transactions which took place on 1st and 2nd May 1943. The learned Crown counsel has strenuously contended that whatever might be the fate of the previous transactions, these are not immune from the effect of the order of 21-4-1943. We feel it difficult to give our assent to this contention. These orders also affect people living in rural areas, far from railways, and generally cut off from all means of communication. It is for this reason that S. 119, Defence of India Rules, insists upon notice to the people concerned, and also insists upon the manner or method in which that notice is to be given. To quote it:

"Notice of such order in such manner as may, in the opinion of such authority, officer or person, be best adopted for informing persons whom the order concerns."

[7] Then follow the different methods prescribed for different classes of people. This notification is itself a departure from the principle of law embodied in the maxim *ignorantia legis non excusat*. Even in England a distinction was made in 1918-1 K. B. 101,<sup>1</sup> between an ordinary law or enactment on the one side and the Defence of the Realm Regulations. At page 103 the learned Judge makes the following observation:

"While I agree that the rule is that a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation, there is about statutes a publicity even before they come into operation, which is absent in the case of many Orders such as that with which are now dealing, indeed, if certain Orders are to be effective at all, it is essential that they should not be known until they are

actually published. In the absence of authority upon the point I am unable to hold that this Order came into operation before it was known, and, as I have said, it was not known until the morning of May 17."

[8] The Defence of India Rules have been largely, if not entirely, modelled on the Defence of Realm Act and the Rules made thereunder, and it is permissible to borrow light from this authority. The learned Crown counsel, however, contends that the publication in the Gazette must be deemed to convey good and effective notice, and the transactions of 1st and 2nd May, 1943, come within the mischief of the Order of 21st April 1943. Reliance is placed for this proposition on Cri. Revn. No. 1331 of 1945<sup>2</sup> decided by a Bench of this Court on 9th May 1946. We do not think that this authority really helps him. All that it says is that the publication in the Gazette is a good publication and it is not necessary for the prosecution to prove that it was made in a manner which was "proper in the opinion of such authority, officer or person." We shall assume that the Governor or the Secretary of the department concerned directed its publication and that it was done in the manner prescribed. But the object of the publication is mentioned in the Rule itself. It is intended for "informing persons whom the Order concerns." It is still open to the applicants to contend that even though there was a publication, the Gazette never reached them. Once it has reached them and conveyed the necessary information it is not open to take exception to the *manner* or the *method* in which the information was conveyed, but the receipt of the information is a *sine qua non*.

[9] We are, therefore, of opinion that the applicants are not guilty of the violation of the provisions of the Order of 20th March 1943, because that Order was wiped out by the Order of 21st April 1943. They are not guilty of the breach of the Order of 21st April 1943, because they received the information, on the testimony of one of the prosecution witnesses himself only on 5th May 1943. We, therefore, allow this application, set aside the conviction and sentence. The fine, if paid, must be refunded. The applicant is on bail and he need not surrender.

N.S./D.H.

Application allowed.

**A. I. R. (34) 1947 Allahabad 110 [C. N. 58]**

ALLSOP AND MATHUR JJ.

*Beni Madho and others — Plaintiffs — Appellants v. Major A. U. John and others — Defendants — Respondents.*

First Appeal No. 71 of 1943, Decided on 9-5-1946, from decision of Civil Judge, Agra, D/- 6-11-1942.

(a) Transfer of Property Act (1882), S. 54—Transfer for consideration other than payments of money or for promise to pay is valid.



A transfer is valid if it is for consideration and there may be valuable considerations other than payments of money or promises to pay money. There would be nothing invalid in a transfer, say in consideration of services rendered. [Para 5]

(b) Transfer of Property Act (1882), S. 54—It is not necessary that consideration for transfer should be immediately ascertainable at time of transfer.

The law does not require that consideration for a transfer should be immediately ascertainable at the time of the transfer. It is sufficient that it should be ascertainable at the time when the payment is to be made. Even if there is some difficulty in ascertaining, that would be no reason for holding that the consideration is not ascertainable. Where the amount spent in litigation conducted by vendee was part of the consideration for transfer, that amount would certainly be ascertainable once the costs had been incurred and the litigation had been concluded. [Para 5]

T. P. Act—

('45) Chitaley, S. 54, N. 12.

(c) Transfer of Property Act (1882), S. 54—Owner can sell property even if not in his actual possession.

There is a distinction between title and possession and there is nothing in law to prevent the owner of property from transferring his title even if the property is in the actual possession of others. [Para 6]

T. P. Act—

('45) Chitaley, S. 54, N. 5, Pt. 13.

(d) Transfer of Property Act (1882), S. 54—Owner of property conveying it to vendee—Vendee in consideration of transfer undertaking to conduct litigation in respect of that property at his expense and to pay fifty per cent. of value of property to vendor after successful termination of litigation—Vendor held transferred property itself and not mere right to institute suit—T. P. Act (1882), S. 6 (e).

An owner of property whose interests in it were in jeopardy owing to claims made by his brothers, conveyed it to the vendee. As consideration for the transfer the vendee was to conduct litigation in respect of the property at his own expense and after successful termination of the litigation, was to pay to the vendor 50 per cent. of the value of the property when recovered:

Held that the vendor transferred the property itself and not a mere right to institute a suit. [Para 8]

Held further that the bargain was not unfair.

[Para 11]

T. P. Act—

('45) Chitaley, S. 6, N. 16.

(e) Contract Act (1872), S. 23—Vendor not pleading that bargain was unfair—Plea as to unfairness of bargain cannot be raised by third party.

Where the vendor never raised the plea that so far as he was concerned the bargain of sale was unfair or unrighteous, an argument on this basis is not open to a third party who has no cause to complain in this matter: 2 Cal. 233 (P.C.), *Expln.* [Para 10]

(f) Evidence Act (1872), S. 18—Due execution of document.

The admission of the execution of a document by the attorney of the man who executed it is evidence to prove that the document was duly executed. [Para 17]

*Walter Datt and P. N. Haksar*—for Appellants.

*J. Swarup, A. Sanyal, A. P. Bagchi, H. P. Bagchi and R. N. Saran*—for Respondents.

Cases referred:—

1. ('31) 54 Mad. 163 : 18 A. I. R. 1931 Mad. 140 : 135 I. C. 17, Venkata Jagannada Rao v. Venkata Kumara Mahipati Surya Rao.
2. ('36) 1936 A. L. J. 915: 23 A. I. R. 1936 P. C. 204: 59 Mad. 910 : 63 I. A. 304: 163 I.C. 4 (P.C.), Venkata Jagannada Rao v. Venkata Kumara Mahipati Surya Rao.
3. ('27) 25 A. L. J. 322: 14 A. I. R. 1927 All. 361 : 49 All. 488: 100 I. C. 610, Kalyan v. Mt. Desrani.
4. ('76) 4 I. A. 23: 2 Cal. 233 : 3 Sar. 654 (P.C.), Ram Coomar Coondoo v. Chunder Canto.
5. ('88) 12 Bom. 686, Manishanker Pranjivan v. Bai Muli.
6. ('11) 33 All. 626: 11 I. C. 932, Baldeo Sahai v. Harbans.

**Allsop J.**—This appeal arises out of a suit for partition and mesne profits instituted by the plaintiff appellants, Beni Madho, on the allegation that he had acquired a share in the properties mentioned in the schedules annexed to the plaint under a deed of sale or assignment executed in his favour by one Henry Celestine John on August 22, 1939. It was stated that Henry Celestine John had three brothers Edwin John, George Anthony John and Anthony Ulysses John, that they jointly held in equal shares forty debentures out of two hundred in the Agra United Mills Limited, that the mortgaged property was put to sale by the debenture-holders and that the properties mentioned in Schs. A to D annexed to the plaint passed to the debenture-holders. It was, therefore, alleged that the plaintiff was entitled to a one-twentieth share in these properties. It was further stated that Henry Celestine John and his three brothers were owners in equal shares of the properties mentioned in schedule E annexed to the plaint and that the plaintiff appellant had acquired a one-fourth share in these properties. The first eight original defendants were Anthony Ulysses John, since deceased, and the representatives-in-interest of Edwin John and George Anthony John. The other defendants except No. 15 were impleaded as holders of mortgages or charges created by the brothers of Henry Celestine John. Defendant 15 was a receiver appointed by the High Court of Bombay in the course of a suit instituted by defendants 9 and 10 on the basis of a mortgage in their favour. The tenth defendant has since died and is represented by the ninth. Anthony Ulysses John is represented by his widow, Adriana John and his son, Anthony John.

[2] The defendants raised various pleas, but those which we must first consider were that Henry Celestine John had no subsisting interest in the properties in suit at the date of the alleged execution of the deed of sale and that even if he had, there was no valid transfer. On the first point the learned Judge of the Court below gave a decision against the defendants.



On the second point he overruled the contention of the defendants that the deed was not proved to be executed, but he found that the deed did not operate to transfer a share in the properties to the plaintiff. His decision was based on two grounds, namely, (1) that the deed does not evidence a sale but evidences a transfer of a mere right to sue which would be void under the provisions of S. 6, cl. (e), T. P. Act, and (2) that the transfer was based on an agreement to finance litigation in consideration of obtaining a share in the property in suit if recovered, which though, as such, was not opposed to public policy was still so opposed because it was based on an unconscionable and extortionate bargain.

[3] In order to understand and discuss the arguments of the learned Judge it is necessary to refer to the deed itself. The deed begins with a series of recitals explaining how the alleged vendor was entitled to the property to be transferred, his reasons for making the transfer and the fact that the transferee had agreed to purchase the property and then contains the following general clause :

"In pursuance of the said agreement with the purchaser and in consideration that the purchaser will at his own expenses and costs take proper legal steps and other necessary proceedings in the litigation herein above referred to and other necessary action to protect and defend the properties hereby conveyed and assigned to him and in further consideration that in the event of his succeeding in litigation the purchaser will pay to the vendor a sum equivalent to fifty per cent of the gross amount and value that be recovered and realised by the said purchaser out of and in respect of the said properties."

[4] In explanation of this clause, it should be stated that the recitals had set forth that the interests of Henry Celestine John were in jeopardy owing to claims made by Anthony Ulysses John and George Anthony John, that he was not in a fit state of health to go to India to protect his interests and that it was necessary to undertake litigation to uphold his rights. After this general clause there are series of clauses by which the alleged vendor granted, conveyed and confirmed unto the purchaser certain shares in various properties. Then there were certain covenants by the vendor intended to secure the purchaser in his rights and lastly there were certain covenants by the purchaser who also executed the deed. The first three of these covenants were that the purchaser should take all necessary steps to enforce the rights of the vendor, that the purchaser should pay to the vendor a sum equivalent to fifty per cent. of the gross amount and value of the property recovered and that the purchaser should have no claim against the vendor in respect of any expenses, costs or other disbursements which he might

have to incur, defray and spend over the litigation. The fourth covenant was that all property recovered by the purchaser in respect of the rights assigned should be paid to the joint account of the vendor and purchaser whose receipt alone should be a sufficient discharge. It may perhaps be mentioned that each of the clauses conveying shares in various properties was expressed to be subject to the covenants by the purchaser.

[5] The learned Judge has referred to the definition of the term "sale" in S. 54, T. P. Act. He says that the price of property sold must be ascertained or ascertainable in money. He then says that the consideration of the so-called deed of sale consists of an undertaking by the vendee that he would fight out the litigation at his own expense and in the event of his success would pay a sum equivalent to fifty per cent. of the gross amount recovered and realised by him. Then the Judge says that the costs of litigation were unknown and unascertainable in advance and besides this there was some risk involved and thus these costs could not be given a market value and this transaction could not be called a sale. He seems to have inferred that the transfer, if not a sale, would necessarily be invalid. There seems to be no force in this contention. A transfer is valid if it is for consideration and there may be valuable considerations other than payments of money or promises to pay money. There would be nothing invalid in a transfer, say, in consideration of services rendered. I may further say that it is difficult to understand the learned Judge's argument that the consideration for this transfer was not ascertainable in money. The law does not require that it should be immediately ascertainable at the time of the transfer. It is sufficient that it should be ascertainable at the time when the payment is to be made. If it can be said that the amount spent in litigation was part of the consideration, that amount would certainly be ascertainable once the costs had been incurred and the litigation had been concluded. No payment was to be made till the property had been recovered as a result of litigation. It is clear, however, that the purchaser did not undertake to pay any sum on account of the costs of litigation to the vendor and therefore it was not necessary to ascertain what those costs were. All he promised to do was to pay half the value of the property recovered and the amount due could clearly be ascertained when the property had come into the possession of the purchaser. Even if there was some difficulty in ascertaining the exact value of the property that would be no reason for holding that the value was not ascertainable. The learned Judge has referred to the



case in 54 Mad. 163<sup>1</sup> but even if that case can be said to support his argument, the decision was set aside in appeal by their Lordships of the Privy Council (1936 A. L. J. 915.<sup>2</sup>)

[6] Then the learned Judge refers to the fact that the vendor was not in actual possession of the property and that it was in the possession of others. This observation does not appear to be relevant because there is a distinction between title and possession and there is nothing in law to prevent the owner of property from transferring his title even if the property is in the actual possession of others. The learned Judge seems to have been influenced by the observations made by Lindsay J. in 25 A. L. J. 322,<sup>3</sup> but I must say, with the greatest respect, that these observations seem to ignore the distinction between title and possession and seem to suggest that a disputed title does not exist until a decree is passed by a Court of law in favour of the claimant, whereas the truth is that a title is merely affirmed and not created by the Court. No Court can pass a decree in favour of a claimant to property unless that claimant has already an existing title. The other learned Judge, Sulaiman J., disagreed with Lindsay J. and I have no doubt that his decision was right.

[7] The learned Judge seems to have thought that the purchaser's fourth covenant, namely, that the property recovered should be transferred to the joint account of the vendor and purchaser implied that the vendor would remain the owner of the property. The learned Judge says, "The sale deed read as a whole would show that Mr. H. C. John tells Mr. Beni Madho that I transfer you property subject to my retaining half share." Even if the deed can bear that interpretation, it must still mean that half of the property was transferred in *præsenti* to Beni Madho. There is no reason why the transfer at least of the half share should not be valid. The learned Judge, however, goes on to argue that the vendor meant to reserve to himself an interest in the property and that he did not intend to pass an absolute title to the purchaser. It is on this basis that he says that this is not a transfer of property but a transfer of a mere right to sue. As I have already said, the argument could not apply to half the share which the vendor purported to transfer because in that half at least he did not retain any interest.

[8] Learned counsel for the respondents has not argued that the transaction was not a transfer. His argument is that the intention of the parties on a proper construction of the deed was that the transfer should not operate and the property should not vest in the purchaser till the proposed

litigation had come to a conclusion and the property had come into the purchaser's hands. In my judgment the deed cannot bear this construction. The vendor has clearly stated in all the paragraphs by which he has conveyed shares in various properties that he is conveying them immediately. The transaction was quite a simple one. The property was conveyed to the purchaser and the price was to be ascertained after the purchaser had recovered the property. At that time the value of the property was to be ascertained and half that value was to be paid to the vendor. The purchaser's covenant to take all necessary steps to recover the property was necessary because the price depended on the recovery. The learned Judge has remarked that the purchaser did not acquire a full title because he could not even settle with the defendants out of Court. There is nothing in the deed which prevents him from doing so, but if by such settlement he recovered less property than he should have recovered he would be liable for a breach of covenant to pay damages to the extent of half the value of the property which he should have recovered if he had properly pursued his remedy. The covenant that the property should be put in a joint account seems only to have been inserted by way of precaution so that the vendor might more easily recover the price that was due to him. It does not to my mind imply an understanding that the vendor should retain a title in half the property recovered. There is nothing in the deed to the effect that the vendor shall be put in possession of any property as such. He is entitled under the terms of the deed only to half the value of the property paid in money. It is not quite clear how any property as such would be put in a joint account. The meaning of the covenant perhaps was that the purchaser should deposit the value of the property in a joint account, but, however that might be, this was purely a matter between the vendor and the purchaser. The final phrase "whose receipt alone shall be a sufficient discharge" probably does mean that a valid discharge could be given only by the vendor and purchaser jointly, but this is an agreement between the purchaser and vendor alone and I cannot see how it can affect any third party. It can refer only to payments of money and not to any property as such. Its probable meaning was that purchaser alone should not operate the joint account. To my mind, it cannot possibly mean that the vendor is to remain owner of any share which he clearly purported to transfer to the purchaser. I am of opinion that the transfer was not invalid for the reasons given by the learned Judge. The vendor transferred the property itself and not a mere right to institute a suit.



[9] Learned counsel for the respondents has argued that there was an intention that the vendor should be joined in any suit instituted by the purchaser for the recovery of the property but he has not referred to any part of the deed from which that intention can be gathered. The purchaser was to undertake the litigation at his own costs and expense and indeed the very reason for the transfer as expressed was that the vendor was precluded by his age, health and financial position from taking any part in the litigation.

[10] The argument of the learned Judge that the transfer was contrary to public policy is based on his conclusion that the property conveyed by the deed was disproportionate to the price which was to be paid by the purchaser. He said that the title of the vendor to the property was quite clear and there was very little risk involved in the litigation. His argument was that Beni Madho would have been sure to win the case if he had impleaded the vendor as co-plaintiff and that he was to get a reward of Rs. 75,000, in case of his success whereas he was likely to spend very little, as compared to this sum, on the litigation. This sum of Rs. 75,000 is estimated value of half the property as set forth in the deed of sale. It is to be noticed that the vendor never raised the plea that so far as he was concerned the bargain was unfair or unrighteous. It seems to me that an argument on this basis is not open to the defendants-respondents who have no cause to complain in this matter. Learned counsel has argued that it was held by their Lordships of the Privy Council in 4 I. A. 23<sup>4</sup> that an unjust agreement to finance litigation was contrary to public policy and that any agreement which is contrary to public policy is void under the provisions of S. 23, Indian Contract Act, and is not merely voidable. His argument is based, it appears to me, on an unjustifiable use of authority. In 4 I. A. 23<sup>4</sup> their Lordships of the Privy Council were not considering whether the agreement was a void agreement under the provisions of S. 23, Contract Act. They were considering whether it should in terms be enforced and I do not think it is safe to infer from the remarks which they made that they would have held that the contract was void as against the whole world if the parties to it had not themselves objected. Learned counsel for the respondents has referred us to two cases, namely, 12 Bom. 686<sup>5</sup> and 33 All. 626.<sup>6</sup> In the first case it is true that the Court refused to enforce the right of the transferee from a minor against third parties on the ground that those parties would be prejudiced if the minor at some later time objected to the transfer. That was a very special case. In the other case the transferor was a party to the suit

by the transferee and himself objected to the transfer.

[11] In the case before us the question also arises whether the bargain can rightly be held to have been unfair or unrighteous so that it would be contrary to public policy to enforce it. The learned Judge may be of opinion that there was no doubt about the vendor's title to the property, but it does not necessarily follow that that was the opinion of the parties to the contract of sale. There is no reason to suppose that they did not think that the vendor had a just claim, but the purchaser might well have thought that he was running a certain risk in view of the chances of litigation. He had undertaken to expend money on instituting a suit and in prosecuting it and the expenses of litigation are by no means small in this country. He may have felt that it would not be worth his while to take this risk unless he received a substantial remuneration in case of his success. Even if he was fairly certain of obtaining a decree it did not necessarily follow that he would be able to execute it without years of trouble and much expenditure. If we are to judge by the results, so far Beni Madho has spent his money, time and trouble and has obtained nothing whatsoever. In my judgment it cannot be said that the bargain was unfair especially as the other party to it has never raised the plea that he was unfairly treated. As far as the respondents are concerned, it is difficult for them to raise the plea that Beni Madho overreached the vendor since they contend that the vendor had no title to transfer and according to them Beni Madho had been induced to spend money without ever having any right to gain an advantage. I think the unsoundness of learned counsel's argument that he can question the validity of the transaction on the ground that it is void as against public policy is apparent because one might raise the hypothesis that the bargain was unfair to Beni Madho and surely if that was the finding it could not be said that the respondents could urge that it was void in spite of Beni Madho's own contention that he was not dissatisfied with it. In my judgment this contention was not open to the defendant-respondents and, even if it was, there is, as a matter of fact, no sufficient reason for holding that the agreement was so unfair to the vendor that the Courts should refuse to give effect to it.

[12] The defence that Henry Celestine John had no interest in the property at the date when he executed the deed of sale is based on the allegation that this was partnership property and that the vendor was so deeply indebted to the partnership that he had lost his interest in the partnership property. There is no evidence at all that he ever transferred his interest to



his alleged partners. Learned counsel for the respondents has not urged, as I understand, that Henry Celestine John had ceased to have an interest in the property in suit but he has raised another argument that the property could be transferred to the plaintiff-appellant only subject to a taking of the partnership accounts. He has urged that the defendants who were partners of the vendor had a lien upon the vendor's share in the partnership property to secure the payments of sums due to them from the vendor in his capacity as their partner.

[13] The properties transferred must be divided into two separate parts for the purposes of this argument. There can be no doubt that all the properties in suit were at one time the properties of a firm operating under the title of A. John & Co. in which the partners were Henry Celestine John, his three brothers and his sister, Lilian Mary Joranides. The sister died in the year 1920 and the original partnership came to an end. Before this event occurred, the firm or partnership had transferred the properties mentioned in Schs. A to D of the plaint to a company known as the Agra United Mills Limited for a large sum of money. The company was not able to pay the full consideration and the four brothers independently took up a number of debentures which were issued by the company, that is, they held mortgages on the property to secure the payment of a balance of the price of this property. Henry Celestine John for his part had debentures to the value of ten lakhs. After the death of the sister, the four brothers set apart a sum of money in their accounts as a reserve for the payment of her share of the assets of the partnership to her executors or trustees. They credited Henry Celestine John with ten lakhs of rupees, the value of his debentures and held those debentures in trust for part of the payment of the sister's share. Eventually the sum due to the sister was paid and the debentures were returned to the brothers. It was shown in the account that each brother was credited with a sum of Rs. 250,000. Finally in or about the year 1927 the debenture holders instituted a suit for the sale of their property on the basis of their mortgage and obtained a decree from the Court. In execution of this decree the property was put to sale and was bought by the holders of the debentures. Eventually in the sale certificate it was shown that each of the debenture holders was entitled to a separate share in the property. The share of Henry Celestine John was the one-twentieth which is claimed by the plaintiff in this suit.

[14] The contention of learned counsel for the respondents is that the four brothers entered into a new partnership after the death of the

sister, that this partnership continued till the death of George Anthony John in 1937 and that the ten lakhs of debentures originally held by Henry Celestine John transferred by him to the brothers after the sister's death and retransferred after the payment of the amount due to her was partnership property.

[15] In so far as we are concerned with the properties in Schs. A to D, it seems to me that there is a complete answer to the respondents' case. Whether there was or was not a partnership up to the year 1937, this property at least after the sale in execution of the decree could not be described as partnership property. George Anthony John instituted the suit on the basis of the debentures as trustee for the debenture-holders but the sale certificate is a document of title and it shows that the property was purchased by each debenture-holder separately. There is nothing in it to suggest that the ten lakhs of debentures originally held by Henry Celestine John were transferred at the sale to a partnership consisting of the four brothers. It is therefore unnecessary to go into the questions of law which can be raised whether the suit was barred by limitation because it was in essence a suit for taking partnership accounts or whether the plaintiff can get the property only subject to a lien held by the other partners.

[16] To the property in Sch. E other considerations apply. This property consists of four houses, three in Agra and one in Mussoorie, and a shop in Agra. Learned counsel for the respondents has argued that this at least must be considered to have been partnership property till the death of George Anthony John in 1937. The property did originally belong to the firm, A. John & Co. He argues that this firm was continued under a new agreement after the death of Lilian Mary Joranides and that the property continued to be the property of the new partnership consisting of the four brothers. There is no evidence however of any definite agreement between the four brothers constituting a new partnership. A reference has been made to certain accounts which are printed on our record but learned counsel for the appellant has argued that these are not strictly proved and, even if they are proved, they do not establish the respondents' case. It appears that Henry Celestine John had gone away to England and was there conducting a branch business on behalf of A. John & Co. The other brothers remained in India and on the face of it it seems that the accounts were not so much the accounts of a partnership but accounts showing the respective rights and liabilities of the four brothers as between themselves. Certain of the items in the accounts could not possibly refer to any part-



nership. There is one item, for instance, of Rs. 25,000 which is credited to George Anthony John alone. It is described as the proceeds of the sale of furniture of a house No. 46 Cantonments, belonging to George Anthony John. There is another entry by which Rs. 5,000, Rs. 3,000 and Rs. 2,500 were credited separately to Edwin John, George Anthony John and Anthony Ulysses John on account of Directors' bonuses paid by the Agra Spinning and Weaving Mills Co., Limited. No reference is made in the accounts to any profits earned by A. John & Co. after 31-12-1921. There is thereafter an entry about small sums said to have been the profits of John Brothers. There is no evidence of any definite contract of partnership between the four brothers after the death of their sister. It seems that they carried on their affairs in some joint way without any definite agreement and they may have thought that there was a partnership of some kind. There is some correspondence between the brothers about the affairs of the business in London managed by Henry Celestine John. There is a letter written by the latter in the year 1926 in which he stated that he understood that A. John & Co. was still a continuing concern. He wished for an explanation of the fact that the accounts sent to him contained no reference to this firm but instead a reference to John Brothers. Probably the brothers were not very clear in their own minds upon the question whether there was or was not a partnership. There can be no doubt that all four brothers had equal shares in the property described in Sch. E, but in the absence of any evidence it cannot be inferred that they treated this property as the property of any partnership. On one occasion at least they mortgaged two of the houses mentioned in the schedule and Henry Celestine John executed a power of attorney by which he authorised George Anthony John and Anthony Ulysses John to execute a mortgage on his behalf. Learned counsel for the respondents has argued that this might merely have been a precaution required by the mortgagee but it is at least in some measure an indication that the property was regarded as being held by the four brothers as tenants-in-common and not as the property of a partnership. The four residential houses at least do not appear to be property that would in normal circumstances be connected with any business. In my judgment it is not established that this property was partnership property so that it would be necessary to go into the accounts of the partnership before allowing the plaintiff to get possession of his share of it.

[17] Learned counsel for the respondents raised some other arguments. One was that George Anthony John who instituted the suit on

the basis of the debentures as trustee for debenture-holders was entitled to get from the plaintiff share of the costs of that suit before transferring the property recovered by means of it. There is a letter from Henry Celestine John in which he admitted that he was liable for his share of the costs of the suit, but it is apparent that there was no charge on the property for the payment of the costs and therefore there is no reason why the plaintiff should be liable for any share of them. Another argument addressed to us by learned counsel for the respondents is that the learned Judge of the Court below was wrong in holding that the deed of sale was executed by Henry Celestine John. He argues that there is no evidence of any witness that the document was executed in his presence. The learned Judge of the Court below has relied on the evidence of two witnesses who have deposed that the signature on the deed is that of Henry Celestine John. The defendants did not definitely deny that the signatures were his and they produced no evidence to rebut the evidence produced by the plaintiff. Henry Celestine John executed a power of attorney in favour of a lawyer in India to enable that lawyer to get the deed registered on his behalf. The deed was duly presented by the attorney for registration and its execution was admitted. Learned counsel for the respondents has argued that he is not bound by any admissions made by Henry Celestine John as he is not claiming the property through him. It seems however that the admission of the execution of the document by the attorney of the man who executed it is evidence to prove that the document was duly executed. However that may be, there is nothing to rebut the evidence of the two witnesses who identified the signature of Henry Celestine John. I have no doubt that the document was duly executed.

[18] The other argument is that there is no positive evidence to prove that Henry Celestine John had understood the contents of the document when he executed it. There was in my judgment no reason for such evidence. There is no suggestion that Henry Celestine John was not of sound mind and the assumption is when he executed a document that he had understood its contents.

[19] Learned counsel for the respondents has mentioned some other points. He has claimed that the defendants should not be liable for any monies by way of mesne profits which did not actually come into their hands. The other side agree that this contention is right. Another point was that the mesne profits should not be calculated on the profits accruing from the working of the mills. It is admitted that the mills were taken over by the Receiver appointed by



the Bombay High Court and that he rented them to George Anthony John and Anthony Ulysses John who worked them in partnership. The other side agrees that the plaintiff is entitled only to his share of the rents paid to the Receiver. Learned counsel for the respondents also wished us to make it clear that mesne profits should be recovered only for the three years next before the institution of the suit and the other side agreed that this is so.

[20] My conclusion is that the plaintiff is entitled to a decree for partition and for mesne profits. I would, therefore, pass a preliminary decree in his favour that he is entitled to one-twentieth share in the properties mentioned in Schs. A to D and one-fourth share in the properties mentioned in Sch. E and that the Court below should partition the property by metes and bounds except in so far as the property is subject to the provisions of the United Provinces Land Revenue Act. I would also pass a preliminary decree that the plaintiff is entitled to mesne profits for a period of three years next before the institution of the suit and thereafter till such time as the property is delivered to him. The Court below will calculate the amount of the profits and pass such decree as is suitable after having made its calculations in accordance with the findings in this judgment. The plaintiff is entitled to his costs from the defendants other than defendant 15 the Receiver appointed by the Bombay High Court, and defendants 7 and 8 who were pro forma. The costs should be incorporated in the final decree of the Court below.

**Mathur J.**—I agree.

**By the Court.**—A decree shall be drawn up as suggested in the judgment of Allsop J.

D S./D.H.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 117 [C. N. 59]**

**IQBAL AHMAD C. J. AND BRAUND J.**

*Benares Bank Ltd. — Appellant v. Bank of Bihar Ltd., and others — Respondents.*

First Appeal No. 40 of 1942, De'd 19-2-1946, from order of Civil Judge, Benares, D/- 7-11-1941.

(a) Registration Act (1908), S. 49 — Equitable mortgage by *M* in favour of *B* — *B* executing promote in favour of *P* and as security assigning debt due from *M* under equitable mortgage by way of unregistered sub-mortgage — Suit by *P* against *M*, *B* and one *D* praying for mortgage decree against *M*—Alternative prayer for money-decree — *D* purchasing mortgage properties and depositing amount in Court—Objection on ground of non-registration of sub-mortgage — Held owing to non-registration *P* could not enforce security against mortgage properties — But *P* had valid and subsisting charge over amount paid in Court by *D*.

*B* a bank took a mortgage by deposit of title deeds from *M* to secure a large sum outstanding on a

running account. Subsequently *B* executed a promote for Rs. 40,000 in favour of *P* and as security for the payment executed a deed of assignment (in the nature of a sub-mortgage) by which *B* assigned the debt due on the equitable mortgage executed by *M* in *B*'s favour and handed over the title deeds to *P*. Admittedly this sub-mortgage was not registered. Thereafter *P* filed a suit against *M*, *B* and *D* (who had contracted to purchase the mortgaged properties) and prayed for a mortgage decree under O. 34, R. 4 and a personal decree under O. 34, R. 6 thus seeking to enforce the security under the sub-mortgage against the properties charged by the equitable mortgage. *P*, in the alternative prayed that if mortgage decree could not be passed, a personal decree against *M* in his favour as sub-mortgagee be passed (thus claiming to stand in the shoes of *B*). After the suit was filed an order for compulsory winding up was passed against *B* and with the leave of the Court *P* was allowed to continue the suit against *B*. The liquidator contended that the sub-mortgage not having been registered the rights under the equitable mortgage did not pass to *P* and he was therefore not entitled to sue on it. During the pendency of the suit, *D* purchased the properties covered by the equitable mortgage and deposited Rs. 50,000 in Court to answer the claim of either *B* or *P*. This purchase was sanctioned by the Court and the question was whether the sum in Court should first be applied in satisfaction of the debt due to *P* or whether it formed part of the assets of the liquidator against which *P* would have a right to prove as a creditor :

*Held* that as a security over the lands comprised in the deposited title deeds the objection as regards non-registration was fatal to the sub-mortgage. But the security of *P* over the debt due under the equitable mortgage was not affected by non-registration of the sub-mortgage and the consequent failure of the charge over the security constituted by the lands and buildings. *P* was therefore entitled to a valid and subsisting charge by virtue of the sub-mortgage over the amount of Rs. 50,000 which was lying in Court to the credit of the suit, and out of that amount he was entitled to be paid the amount due on the promissory note executed by *B* to *P* : 18 A. I. R. 1931 P. C. 245, *Rel. on.*

[Paras 13, 15, 17]

(45-Com) Registration Act, S. 49, N. 23.

(b) Companies Act (1913), S. 109 — Registration under — Validity of charge does not depend upon date of registration — Particulars sent in within 21 days from date of execution — Owing to dispute about fees registration effected after 2 years — Security is not destroyed.

It is important to notice the distinction that what avoids the charge is not lack of registration under S. 109 but the neglect to send in the particulars. The validity of the charge does not depend on the date on which the Registrar chooses to make the necessary entry in the register : (1924) 1 K. B. 431, *Rel. on.*

[Para 16]

The section is complied with if the particulars of the charge are finally submitted within 21 days from the date of execution of the charge. Where this has been done the mere fact that the registration was allowed to stand over for a period of over two years owing to some outstanding dispute about the fees would not destroy security.

[Para 16]

(c) Companies Act (1913), S. 109 — Registration should not be unduly delayed.

The provisions of S. 109 are designed as a protection to the public. Hence the matter of registration of the charge under S. 109 should not be allowed to be delayed for an unduly long time.

[Para 16]



(d) Companies Act (1913), S. 114 — Certificate of registration granted—Registration cannot be challenged.

Once a certificate of registration is granted under S. 114, it is no longer open to challenge any of the mechanical steps of registration including the delivery of particulars or the payment of prescribed fees : (1908) 1 Ch. D. 152 and (1924) 1 K. B. 431, *Ref.*

[Para 16]

*S. N. Sen and Mukhtar Ahmad*—for Appellant.

*P. L. Banerji, A. Sanyal, Damodar Das, K. P. Gupta and Radha Kishan*—for Respondents.

Cases referred :—

1. ('35) 22 A. I. R. 1935 All. 837 : 158 I. C. 525, *Gopinath v. Mt. Bekali*.
2. ('31) 59 Cal. 377 : 18 A. I. R. 1931 P. C. 245 : 58 I. A. 323 : 134 I. C. 651 (P. C.), *Imperial Bank of India v. Bengal National Bank Ltd.*
3. (1924) 1 K. B. 431 : 93 L. J. K. B. 241 : 130 L. T. 465, *National Provincial Union Bank of England v. Charnley*.
4. (1908) 1 Ch. D. 152 : 77 L. J. Ch. 43 : 97 L. T. 824, *In re Yolland*.

**Braund J.** — This is a first appeal from the decision of the learned Additional Civil Judge of Benares in a suit which relates to the transactions of the Benares Bank Limited, now in liquidation. The facts are relatively simple and, we venture to think, when understood, themselves go a long way towards providing the solution of the difficulties which have occurred.

[2] On 3.12.1936 the Benares Bank Limited (hereinafter called "the Benares Bank") in the course of its business took a mortgage by deposit of title deeds from a certain Rai Sahib Har-krishna Das and others to secure a principal sum of Rs. 2,10,000 then outstanding against the mortgagors on a running account with the Bank. The title deeds deposited with the Benares Bank related to certain lands and buildings more particularly described in the Sch. 2, to the instrument of mortgage. The terms of the instrument of deposit are not very material, but it may be observed that the security was for the principal sum together with interest thereon at the rate of seven and a half per cent. per annum and that, following the customary form, the mortgagors (whom, to save confusion, we shall hereinafter refer to as the "principal mortgagors") undertook at the request of the Benares Bank at any time to execute a mortgage over the properties in the English form. The date for the repayment of the debt was expressed to be 31.12.1938.

[3] On 24.4.1939 the Benares Bank, being itself then in need of money, either borrowed from, or were then themselves indebted to, the Bank of Behar Limited (hereinafter called the "Behar Bank") in a sum of forty thousand rupees, for which on that date a promissory note was executed by the Benares Bank in favour of the Behar Bank. At the same time, as a security for the payment of this sum of forty

thousand rupees by the Benares Bank to the Behar Bank the former executed what is described as a "deed of assignment", which is set out at p. 35 of our paper book. This instrument of 24.4.1939, which we shall hereinafter refer to as the "sub-mortgage", was, so far as material, in the following terms:

"We hereby assign to the Bank of Behar Limited the following debts as security for an advance of Rs. 40,000 (rupees forty thousand) taken from them under a promote executed by us of date. The debts are unencumbered and nothing out of it has been realised. Any payment made to us in future towards the same will be handed over to the Bank of Behar Limited immediately . . . . . Details of debts. Equitable mortgage, dated 3.12.1936, from Rai Sahib Har-kishan Das and others to Benares Bank Limited."

Then followed a list of the title deeds in the custody of the Benares Bank as principal mortgagees which were handed over to the Behar Bank as sub-mortgagees.

[4] It should be noticed that between the date of the principal mortgage in 1936 and the date of the sub-mortgage in 1939 very substantial payments had been made by the principal mortgagors in reduction of their running account with the Benares Bank with the result that at the latter date there was only outstanding on the security of the principal mortgage a sum of Rs. 47,112.

[5] On 1st February 1940, the Behar Bank launched the suit out of which this appeal arises. It is, we think, material for us to pay some attention to the exact form which this suit took in the first place. The first eight defendants to it were the then principal mortgagors. Defendant 9 was the Benares Bank, which was, of course, the principal mortgagee and the mortgagor in respect of the sub-mortgage to the Behar Bank. A 10th defendant who was a certain Mr. Dalmia, was also added. His concern with the matter was that he had prior to the date of the suit entered into a contract for the purchase of the mortgaged properties which consisted of collieries. The plaint started by setting out the fact that the Behar Bank had become the assignee of the principal mortgage by virtue of the sub-mortgage of 24th April 1939. It went on to admit that only a sum of Rs. 47,112, was then outstanding on the principal mortgage, and it then set out the particulars of the sub-mortgage of April 1939. In the form in which it was originally drafted, it concluded with prayers, first, for a mortgage decree under O. 34, R. 4 of Sch. 1, Civil P. C., against the principal mortgagors and, secondly, for liberty to apply, in the event of there being a deficiency after sale, for the usual personal decree against the original mortgagors. It is to be noted that these two prayers which are numbered (a) and (b) in the plaint are based upon the footing that the plaintiffs were seeking to



enforce their security constituted by the sub-mortgage *against the properties* comprised in and charged by the original mortgage. The third item of relief which the plaintiffs claimed was that "if for any reason the plaintiff be not deemed entitled to the reliefs claimed above"—meaning relief on the footing of the sub-mortgage—"then a decree for Rs. 40,000 as principal and Rs. 1,559-11-9 interest . . .". This obviously was a claim on the personal covenant to pay, but the plaint omitted to state against whom the claim was made.

[6] The next material event which occurred was that on 1st March 1940, a compulsory winding up order was made in this Court against the Benares Bank. On the making of the winding up order, it was obvious that the suit, so far as it was a suit against the Benares Bank, could not proceed without the leave of the winding up Court under S. 171, Indian Companies Act. This accordingly was applied for by the plaintiffs in April 1940, and, as was obviously proper, leave was given by the winding-up Court to the Behar Bank to proceed with the suit. Thereafter in July 1940, and September 1941, further amendments were made in the third part of the relief claimed by the plaint which made it evident that what the plaintiffs were claiming was a personal decree against the mortgagors in favour of the plaintiffs "as assignee of the debt due to defendant 9", that is to say the Benares Bank. It follows, therefore, that what the plaintiffs were really claiming by the third part of the relief sought by them was a decree in their favour as sub-mortgagees against the original mortgagors. In other words they were claiming to stand in the shoes of the Benares Bank.

[7] We do not think that we need deal with any of the written statements except possibly that of the Benares Bank. The liquidator of the Benares Bank by the Bank's written statement of May 1940 admitted that the outstanding balance of the account between the Behar Bank and the Benares Bank was then Rs. 41,559-11-9 in favour of the former. It went on, however, to take two substantive points in opposition to the sub-mortgage. First it contended that the sub-mortgage had never been registered under the Registration Act and that, therefore, "the rights under the said equitable mortgage" — meaning the principal mortgage — "did not pass to the plaintiff and, secondly, the plaintiff has no right or locus standi to sue on the basis of the equitable mortgage." The second point taken by the Liquidator was that the sub-mortgage had never been registered with the Registrar of Joint Stock Companies under S. 109, Companies Act, and accordingly that it was void as a security as against the Liquidator and the creditors of the

Benares Bank. This last mentioned contention on the part of the liquidator involves certain further facts relating to the registration of the sub-mortgage with the Registrar of Joint Stock Companies, which are not, we think, in dispute, which it will be convenient here to set out.

[8] The sub-mortgage was executed, as we have already said, on 24th April 1939. Particulars of the charge created by it were sent by the Benares Bank to the Registrar on 4th May 1939, but they were not sent on the prescribed form and were not accompanied by the prescribed fee. On 8th May another form was substituted by the Benares Bank, but this too, was rejected by the Registrar on the ground that the form was obsolete. On 11th May one of the Directors of the Benares Bank went and saw the Registrar at Lucknow and on that day lodged the particulars with him on the correct form. The Registrar actually examined the original of the instrument of charge and, having stamped it, returned it to the Director of the Bank. That, it is to be observed, was well within the period of 21 days from the date of the execution of the charge. It seems that the prescribed fee had still not been paid and, on the 15th May, a sum of Rs. 10 was sent to the Registrar, but, after a delay of six weeks, the Registrar pointed out that this was not enough and that a further sum of Rs. 20 was necessary. This led to a wrangle between the Bank and the Registrar after which the whole matter went to sleep until 24th September 1941 when, as a result of renewed proceedings, the charge was actually registered by the Registrar. Finally, the Registrar issued a certificate of the registration of the sub-mortgage, the actual date of which is immaterial, under S. 114, Companies Act.

[9] Those are the material facts. But before seeing how the matter was dealt with when it came before the learned Judge of Benares for hearing, there is one further relevant matter to be mentioned. In July 1941 during the pendency of the suit, a compromise was arrived at between the defendants inter se. This is set out at p. 14 of our paper book. It was a very simple arrangement. It will be remembered that Mr. Dalmia had become the purchaser of the property under a contract. What was agreed between the defendants was that this contract should be proceeded with notwithstanding the suit and that Mr. Dalmia should pay into Court in the suit a sum of Rs. 50,000 to answer the claim of the Behar Bank or the Benares Bank as the case might be according to the result of the proceedings. It is an open question whether the Behar Bank as the plaintiffs might have objected to this course; but the fact is that they did not and they do not now object. It is very



material, therefore, to observe that, as a result of this compromise, which was recorded and sanctioned by the Court, the dispute has now shifted from the rights of the plaintiffs as against the property comprised in the security to their rights as against the sum of Rs. 50,000 now lying in Court to the credit of the suit. In other words, all question of the realization of the mortgage securities over the actual properties has now disappeared, and the issue is now the very simple one as between the Behar Bank and the Liquidator of the Benares Bank whether the sum in Court should be first applied in satisfaction of the debt due to the Behar Bank or whether such sum should form part of the assets of the Liquidator against which the Behar Bank will have a right to prove merely as a creditor. It would appear almost that at that point the first eight defendants might have disappeared from the suit.

[10] We are now in a position to see how this matter was dealt with by the learned Judge in the Court below. We regret to say that it left something to be desired, although we bear in mind that the matter was possibly an unusual one. After setting out seven issues, on which we have no comment to make, the learned Judge proceeded with a paragraph which has caused a good deal of difficulty. He said :

"Though the plaintiff bank originally prayed for a mortgage decree under Order 34, R. 4 of the Civil P. C., but it subsequently made a prayer for a simple money decree in the event of a mortgage decree not being granted. During the course of arguments, the learned counsel of the plaintiff did not press for a mortgage decree and did not argue that he was entitled to one. On the other hand, he argued that the mortgage deed be regarded as a simple money bond for the purpose of his claim. The question of admissibility of the assignment in evidence, therefore, does not arise. The plaintiff was assigned only the debt and not the security by the assignment. Such an assignment does not require registration and can be admitted in evidence, (see A. I. R. 1935 All. 837<sup>1</sup> at page 838). The transfer was legal. The issues are decided according to this finding in favour of the plaintiff."

[11] It would certainly appear from this that at the trial the plaintiffs abandoned their claim under the security and relied entirely on their claim to have a decree on the debt. Again, it is not clear from the language the learned Judge has used whether what they were claiming was a simple money decree against the Benares Bank or against the original mortgagors. We point this out because a good deal of confusion has been introduced into this case by what appears to have been an abandonment by the plaintiffs of their claim as secured creditors of the Bank. However that may be, the learned Judge then went on to decide that the sub-mortgage had been duly registered with the Registrar of Joint Stock Companies, which, as we

shall point out presently, was not quite the correct way of putting it; he then decided that the plaintiffs were not precluded from getting a simple money decree by virtue of S. 171 of the Indian Companies Act; and he concluded his judgment by another passage which has caused a good deal of difficulty. He said:

"The Benares Bank was made only a *pro forma* defendant by the plaintiff. No relief was sought against it during arguments also. The official liquidator contested the suit on the ground that the Benares Bank was entitled to recover the money from the defendants of the first party as the assignment was invalid, but it was held above that the assignment was valid and the plaintiff had a right to sue.

The defendants of the first party appear to have transferred the mortgaged property to Mr. Dalmia, who deposited Rs. 50,000 in Court to be given to the successful party. The plaintiff is entitled to recover the amount of his claim with costs and pending and future interest at Rs. 3 per cent. per annum out of this amount subject to delivery of the title deeds to Mr. Dalmia, but I shall make no order in this respect. The issue is decided according to the above findings.

#### ORDER.

The suit is decreed with costs and pending and future interest at Rs. 3 per cent. per annum against the defendants of the second party. The defendants of the second party who are *pro forma* defendants will bear their own costs."

[12] When it came to the actual decree, it was drawn up, as we have so often had occasion to complain, in a manner which only served to produce fresh confusion. There was a decree that "the plaintiff's claim.....be decreed against the defendants second party"—that is the Benares Bank; and that "the defendants second party do pay Rs. 47,112" with interest to the plaintiff. We are at a loss to understand what this really means and, indeed, it is impossible, apart from anything else, to find any support for the figure of Rs. 47,112. That is the condition with which we are faced in this appeal.

[13] In our judgment the matter is not quite so complicated as it seems; and we propose to try to clear the ground by taking the questions which have been canvassed point by point. There is no dispute but that the so called assignment of 24th April 1939 was executed by the Benares Bank in favour of the Behar Bank. And there is no dispute but that a sum of Rs. 41,559-11-9 was due from the Benares Bank to the Behar Bank at the date of the commencement of the suit. The first thing that is said on behalf of the Benares Bank, who are the only appellants in this case, is that, by virtue of the provisions of S. 17, Registration Act, the Behar Bank cannot rely on the security of the sub-mortgage at all because it was not registered. It is admitted that it never has been registered and the only question is what is the effect of that. We entirely agree with the view of the Liquidator that as a security over



the land comprised in the deposited title deeds this objection is fatal to the sub-mortgage of 24th April 1939. Nor do we think that Dr. Kailash Nath Katju on behalf of the Behar Bank seriously contends otherwise. But what Dr. Katju does say is that, notwithstanding that the security may have failed as a security over the properties charged, it did not fail on account of non-registration as a charge over the debt due by the mortgagors to the Benares Bank. The debt due at the date of the said mortgage by the mortgagors to the Benares Bank was a debt due to the Bank in the course of its business and it is quite clear from the language of the sub-mortgage at page thirty-five of our paper book that what was assigned to the Behar Bank was the debt. The learned Judge was right when he said that the plaintiff was assigned the debt and we agree that it may be an open question whether there was any assignment of the security at all. The one thing that is certain in our view is that the instrument on 24th April 1939 constituted an assignment in favour of the Behar Bank of the debt, although it was to be held as security.

[14] Dr. Katju relies on 59 Cal. 377<sup>2</sup> at p. 386 in which the Privy Council decided an almost exactly similar question. In that case a Bank to which debts were owing, which debts were secured by the deposit of title deeds, had created a floating charge over all its assets. The floating charge was not registered under the Indian Registration Act, 1908, and it was held—indeed, it was not contended otherwise before the Privy Council—that the floating charge failed as a security over the properties comprised in the several deposits of title deeds by the customers. The question remained, however, whether the floating charge, notwithstanding its non-registration, remained effective as against the debts, *qua* unsecured debts, of the several customers of the Bank. Their Lordships held that it did and they took the view that those debts were charged independently of the properties to which the title deeds related. They held moreover that it was too narrow a view of the construction of S. 130, Transfer of Property Act, 1882, to suppose that the debt was not an actionable claim which could not be transferred independently of the security. They said that there appeared to be no difficulty in a transfer of a debt without a security, which the original debtor could always redeem and, in the result, they held that, while the Imperial Bank, in whose favour the floating charge existed, had no right or interest in the immovable property of the Bengal National Bank, including the immovable property over which it held security, the Imperial Bank had a charge over the debts due to the

Bengal National Bank, whether secured or not, and were entitled to the benefit of all sums received in reduction of those debts, whether from the realization of securities or otherwise.

[15] We think, therefore, that, if one thing is more clear than another in this case, it is that the security of the plaintiffs, the Behar Bank, over the principal debt was not affected by the non-registration, and consequent failure of the charge over the security constituted by the immovable property. As we have already pointed out, in the events which occurred, no question arose at the hearing as to how those debts should be realised in favour of the Behar Bank, since, as a result of the compromise, they had then come to be represented by the single sum of fifty thousand rupees standing in Court to the credit of the suit. The whole matter had thereby become very much simplified. We accordingly hold that the result of the non-registration of the sub-mortgage of 24-4-1939 was not to destroy the security of the Behar Bank over the debt due to the Benares Bank and the proceeds of such debt when realized, as it since has been.

[16] That disposes of the first point. We then meet the second point which is the point relating to the alleged failure of the Benares Bank to register the security with the Registrar of Joint Stock Companies under S. 109, Companies Act. It has to be noticed that if this objection to the security is a valid one, it is fatal to the whole claim of the plaintiffs, so far as its security is concerned, since the section avoids the security altogether as against the Liquidator and the creditors. But, in our judgment, on a proper consideration of the facts and in the events which have happened, we do not think that the effect of S. 109 was to destroy the security. It has to be observed, as was pointed out by Lord Justice Scrutton in 1924-1 K. B. 431,<sup>3</sup> at p. 447, that what avoids the charge is not lack of registration but the neglect to send in the particulars. It is important to notice that distinction. On the facts of the present case, which facts are not in dispute, particulars of the charge were sent in to the Registrar. They were sent in on 11-5-1939, well within the twenty-one day period. It is true that there was an outstanding dispute as to the fee; but, nevertheless, the particulars were sent to the Registrar. It is true also that actual registration was not effected for over two years, but, as we have pointed out, the validity of the charge is not made to depend by S. 109 on the date on which the Registrar chooses to make the necessary entry in the register. Unfortunately we cannot pretend to think, so far as the facts are available on the material before us, that the proceedings of the Registrar have been satisfactory in this case. We think on the contrary that



it would be in the interests of the public if some explanation were called for from him as to how it came about that registration of this charge was neglected for a period of two and a half years. The provisions of S. 109 are designed as a protection to the public and we feel that, unless there is some explanation which is unknown to us, some explanation is due from the Registrar as to the apparent neglect by him of his duties in this case under this section of the Indian Companies Act. However that may be, we are inclined to agree with Dr. Katju when he says that the Benares Bank had complied with the condition of the section when it finally sent in the particulars of the charge on 11th May. There is the further subsidiary point made by Dr. Katju that the Registrar did actually, though later, issue a certificate under S. 114. While it may be a matter of grave doubt whether such a certificate could ever render valid something that had already been declared void by S. 109, we think, at least, that in face of the certificate it is no longer open to the Benares Bank to challenge any of the mechanical steps of registration, including the delivery of particulars and the payment of the prescribed fee (see 1908-1 Ch. D. 152<sup>4</sup> at p. 159 and 1924-1 K. B. 431.<sup>3</sup>)

[17] As a result of these findings, we are compelled to hold that the security of the sub-mortgage dated 24-4-1939 in favour of the Behar Bank, so far as it was a security over the debt, was at the date of the winding up order a valid and subsisting security. We think that subject to one or two subsidiary points, this disposes of the appeal.

[18] We still have to deal with that curious passage in the judgment of the learned Judge on which we have already commented from which it would appear that the plaintiffs at the trial abandoned their case and were content to rely on obtaining a simple money decree against either the Benares Bank or the mortgagors. We are told by Dr. Katju that this was never the intention of the plaintiffs and that the whole matter was misunderstood by the learned Judge. It may possibly be the result of the intermediate payment into Court as a result of the compromise, from which the learned Judge may have been led to think that the question had resolved itself merely into one of the payment of money. We are inclined to think that this probably is the true explanation. However that may be, it is, we think, obvious from the concluding passage of the judgment that the plaintiffs had not abandoned their interest as sub-mortgagees. The learned Judge himself says, in the passage which we have already quoted, that :

" . . . The plaintiff is entitled to recover the amount of his claim with costs and pending and future interest

at Rs. 3 per cent. per annum out of this amount subject to delivery of the title deeds to Mr. Dalmia. . . ."

[19] It is clear from this that they were still relying on their security. Otherwise the words "out of this amount" would be meaningless. What really has happened is that the learned Judge thought that the mere fact that the whole dispute had then become centred on the sum in Court, destroyed the character of the suit as a mortgage suit. This, of course, was not so, although it is true that thereby he was probably absolved from making a formal mortgage decree and the matter had been simplified for him by enabling him merely to make a decree as to how the sum standing in Court should be distributed. As a result of this view of the matter we do not think we could justly allow this appeal to succeed on the ground that the plaintiffs had abandoned their claim under the security so far as the debt was concerned.

[20] We feel it right to say, although it will not now be necessary for us to discuss it at any length, that, had we taken the view that the Behar Bank had abandoned its security over the debt, we should have felt a considerable difficulty in upholding a simple money decree either as against the mortgagors and still more so against the Benares Bank. The question whether the plaintiffs had ever been given leave under S. 171, Companies Act to prosecute a simple money claim against the Benares Bank would have constituted a formidable difficulty. In the view we have taken, however, these questions do not arise.

[21] In the result, therefore, we think that this suit succeeds to the extent at any rate that the decree must be varied. For the reasons we have expressed above we think that the decree of the learned Judge should be set aside and the following decree should be passed:

"1. There will be a declaration that the plaintiffs, the Bank of Behar Limited, are entitled to a valid and subsisting charge by virtue of the instrument of 24-4-1939 over the debt of 47,112-0-0 mentioned in paragraph 5 of the plaint and over the proceeds thereof in the hands of the Benares Bank Limited (in Liquidation), which said debt and proceeds are now represented by the sum of fifty thousand rupees standing in Court to the credit of this suit.

2. A decree for the payment out of Court to the plaintiffs out of the said sum of fifty thousand rupees of the sum of Rs. 41,559-11-9 together with interest thereon at the rate of three per cent. per annum from 5-2-1940 up to the date of payment and together also with the costs hereinafter mentioned.

3. An order that the parties do bear their own costs of the suit in the Court below and that the respondents, the Bank of Behar Limited, do pay to the appellants, the Benares Bank Limited (in Liquidation), such proportion of the cost of this appeal as the sum of Rs. 5,553 bears to Rs. 47,112."

[22] We feel that there should be no costs in the Court below because the plaintiffs by their



pleadings made a considerable contribution to the confusion which occurred which gave rise to the necessity for this appeal. On the other hand in this Court the appellants have succeeded to a limited extent. We have only to add that we view with considerable alarm a state of affairs in which such a mortgage as the present could have remained unregistered in the circumstances of this case for a period of two and a half years without any proceedings having been taken under S. 122, Companies Act.

N.S./D.H.

*Decree varied.***A. I. R. (34) 1947 Allahabad 123 [C. N. 60]**

BRAUND J.

*Emperor v. Kesri and others—**Opposite Party.*

Criminal Ref. No. 926 of 1945, De'd on 23-1-1946, made by Sessions Judge, Saharanpur, D/ 19-1-1945.

Criminal P. C. (1898), S. 350-A—S. 350-A applies only where there has been subtraction from strength of Bench during course of proceedings—It does not apply where there is substitution or addition.

Section 350-A is a saving section and an order or judgment which is not saved thereunder will be invalid and not merely irregular. [Para 5]

The only possible case to which S. 350-A can reasonably be applied is that case in which there has been a subtraction from the strength of the Bench during the course of the proceedings. It cannot apply to a case in which there has been either a substitution or an addition in or to the composition of the Bench, since in that case it would never happen that the Magistrates constituting the Bench at the time of the delivery of the order or judgment had been present throughout. That condition which after all is the most important condition of the whole section can only be complied with where there has been a subtraction from the strength of the Bench: *View of Sulaiman C. J. in 21 A. I. R. 1934 All. 144, Foll.* [Para 5]

A trial began before a Bench of two Magistrates. Subsequently a third Magistrate was added to the Bench not in succession to any other Magistrate who had ceased to exercise jurisdiction in the case, but simply as an addition to the strength of the Bench. The three Magistrates joined in passing an order or judgment:

*Held* that the order was not saved by S. 350-A, and must be set aside. It was also not saved by S. 350.

Cr. P. C.—

[Paras 6 &amp; 7]

('46) Chitaley, S. 350-A, Notes 2 and 4.

Deputy Government Advocate—for the Crown.

Cases referred:—

1. ('34) 1934 A. L. J. 376 : 21 A. I. R. 1934 All. 144 : 56 All. 599 : 152 I. C. 158, Dasarath Rai v. Emperor.
2. ('42) 1942 A. L. J. 609 : 30 A. I. R. 1943 All. 20 : I. L. R. (1943) All. 23 : 204 I. C. 323, Har Narain v. Emperor.

**Order.**—This involves a recommendation made in a reference to this Court by the learned Sessions Judge of Saharanpur. It is a small matter in itself, but is important and interesting as of general application. The facts are very short and simple. Four men were tried on

charges under ss. 325 and 448, Penal Code, by a Bench of Magistrates. The proceedings began on 13.3.1944 before a Bench of two Magistrates, namely, Messrs. Jagmandar Das and Syed Hasan Abbas. No one has suggested that that Bench of two Magistrates was not well constituted and competent to hear the case. The proceedings, however, continued through March and April 1944 and on 26th April 1944, a third Magistrate, Mr. Jagat Ram, was added to the Bench not in succession to any other Magistrate who had ceased to exercise jurisdiction in the case, but simply as an addition to the strength of the Bench. That is important. Mr. Jagat Ram took his seat on this Bench on 26th April. The hearings in the case proceeded and ultimately all three of the Magistrates joined in passing an order or judgment on 4-7-1944. There is one further slight complication, namely, that it is alleged that on 26th April and 17th May one other of the three Magistrates, namely, Jagmandar Das, was not present at the hearing. I shall accept that fact as being true. In due course the accused were convicted and went in revision before the learned Sessions Judge of Saharanpur. The Judge has found—and in this I agree with him—that Jagmandar Das was absent from the Bench on 26th April and 17th May, while Jagat Ram did not join it until the 26th April and accordingly was not present at any hearing before that date. In view of those circumstances he has recommended to the High Court that the conviction should be set aside.

[2] The point is an interesting one and it turns on ss. 16, 350 and 350A, Criminal P. C., together with Rule 3 of the Rules for the guidance of Benches of Honorary Magistrates to be found in paragraph 814 of the Manual of Government Orders.

[3] Section 16, Criminal P. C., gives the District Magistrate subject to the control of the Provincial Government, power to make rules consistent with the Code for the constitution of Benches of Magistrates for conducting trials. Under these rules it must be assumed that the District Magistrate of this particular district made Rule 3 which is set out at page 814 of the Manual of Government Orders, that is to say :

“ 3. The Bench may hold one or more adjourned sittings, if this be found necessary, for the disposal of business or of part-heard cases : provided that if any case is adjourned, and the members at the adjourned session are not the same as sat at the first hearing of the case, the provisions of S. 350, Criminal P. C., will be held to apply to the case.”

[4] In my judgment we have to start the discussion by considering S. 350A of the Code. That section says that:

“No order or judgment of a Bench of Magistrates shall be invalid by reason only of a change having



occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under Ss. 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings."

[5] Now, that is a section which deals with those cases in which there has been "a change . . . in the constitution of" a duly constituted Bench. It sets out the conditions which have to be complied with in order that a judgment or order of such a Bench, that is to say, a Bench the constitution of which has been changed, may be saved from "invalidity." It is to be noticed that what S. 350A saves the order or judgment from is not mere "irregularity," but actual "invalidity." The conditions laid down by S. 350A are stringent and the concluding words make it quite certain that no such order or judgment will be saved from "invalidity" in a case in which the Magistrates constituting the Bench — i. e., the Magistrates constituting the Bench making the order or delivering the judgment — have not been present on the Bench throughout the proceedings. It would seem to be an inevitable inference to be drawn from S. 350A that any order or judgment which is not saved thereunder will be invalid. We start with the assumption on general principles that a Bench or Court hearing a case will remain constant until that case is finished. It would seem, therefore, that S. 350A is a saving section and accordingly that, where not saved, the ordinary principles will apply. I have been referred to the Bench case in this Court of 1934 A. L. J. 376.<sup>1</sup> In that case Sir Shah Mohammad Sulaiman took the same view of the effect of S. 350A, Criminal P. C., and treated it as a saving section. In other words, those cases which did not come within the four corners of S. 350A were not "saved." But there is one respect in which, with great deference, I have a little difficulty in following the reasoning of the learned Chief Justice. He held that a change in the constitution of the Bench during the proceedings and in a case in which all the Magistrates constituting the Bench had not been present throughout the proceedings, produced a mere "irregularity." I have with respect some difficulty in following this. It seems to me that by reason of the use of the word "invalid" in the second line of the section, it must mean that everything which is not made valid by the section shall remain, not merely irregular, but "invalid." Sir Shah Mohammad Sulaiman has pointed out, and again with respect I entirely agree with him, that the only possible case to which S. 350A can reasonably be applied is that case in which there has been a subtraction from the strength of the Bench during the course of the proceedings. It cannot apply to a case in

which there has been either a substitution or an addition in or to the composition of the Bench, since in that case it could never happen that the Magistrates constituting the Bench at the time of the delivery of the order or judgment had been present throughout. That condition, which after all is the most important condition of the whole section, can only be complied with where there has been a subtraction from the strength of the Bench.

[6] Reverting, therefore, to the present case I entertain no doubt that it is not one which is covered by S. 350A. Mr. Jagat Ram joined the Bench half way through the proceedings and it can never be said in that case that the Magistrates constituting the Bench which passed the judgment or order in question were present on the Bench throughout the proceedings.

[7] It is next suggested that the present order may be saved by S. 350, Criminal P. C. In terms S. 350 has no reference to the present case at all, since it is not a case in which any Magistrate ceased to exercise jurisdiction in the case and has been succeeded by another Magistrate. But it is said that S. 350 is made applicable by Rule 3 of the Rules referred to above. In my opinion, this is not so. I have already set out Rule 3 above. It purports to prescribe what is to happen where "any case is adjourned and the members at the adjourned sessions are not the same as sat at the first hearing of the case . . . in other words, where there has been a change in the composition of the Bench. And it purports in every such case to make the provisions of S. 350, Criminal P. C., applicable. In other words, it purports to introduce S. 350 into all cases in which the composition of the Bench at a subsequent hearing is not the same as the composition of a Bench at a previous hearing. That can be put in another way by saying that it usurps the functions of S. 350A. As I have explained, S. 350A, Criminal P. C., sets out those cases — and those cases only — in which judgments or orders are to be saved from invalidity. Section 350A is part of the Cr. P. C. itself; and, notwithstanding that R. 3 of the Rules is made under S. 16 of the Code, it is not I think open to the rule to vary the substantive sections of the Code, because the rules must be consistent with the Code. If R. 3 were taken literally, then it would apply S. 350 to a case of the addition of a member to the Bench during the pendency of the proceedings. That would at once bring it into conflict with S. 350A, as Sir Shah Mohammad Sulaiman has construed that section. There would then be produced a repugnancy between the Rule and the section to which the Rule must necessarily yield.



[8] For these reasons, which I have set out at some length, I propose to accept this reference and to set aside the order of the Magistrates and to direct that the applicants be acquitted and the fines, if paid, refunded. I have only to add that I have also been referred to a case of a single Judge in this Court in 1942 A. L. J. 609<sup>2</sup> in which it is possible that there are passages which are not wholly in agreement with the views expressed above.

D.S./D.H

Reference accepted.

A. I. R. (34) 1947 Allahabad 125 [C. N. 61]

WALI ULLAH J.

*Sri Newas — Plaintiff — Applicant v. Lala Durga Prasad — Defendant—Opposite Party.*

Civil Revn. No. 235 of 1945, De'd on 28-10-1946, from order of Small Cause Court Judge, Cawnpur, D/- 23-12-1944.

Provincial Small Cause Courts Act (1887), S. 17, Proviso — Personal security bond filed by defendant and notice issued to plaintiff within period of limitation—Implication is that security furnished is sufficient — Condition provided in proviso is fulfilled.

Where an *ex parte* decree is passed by a Small Cause Court, the applicant against whom the decree is passed must present his application for setting aside the decree together with the security demanded before the expiration of thirty days of limitation as provided by Art. 164, Limitation Act. If the security filed be in pursuance of a direction by the Court and the Court accepts the security without question and directs a notice to issue before limitation has expired, it, by necessary implication, gives a direction that the security furnished is sufficient to its mind : 18 A. I. R. 1931 All. 727 (F. B.), *Foll.* [Para 6]

An *ex parte* decree was passed by a Small Cause Court on 27-7-1944. The application for setting it aside along with a prayer that the defendant might be permitted to furnish personal security in lieu of cash deposit was filed on 2-8-1944. Notice to the plaintiff was issued on 15-8-1944 and after considering his objections, the Court on 2-11-1944 set aside the decree and restored the suit on condition that as the security bond was not properly worded the defendant should deposit the decretal amount in cash. As this was not done the plaintiff urged that the application for setting aside the *ex parte* decree should be dismissed :

*Held* that as on the filing of personal bond as security by the defendant, notice to plaintiff was issued within the period of limitation, the requirements of the proviso to S. 17 were fulfilled and as there was nothing on record to show that the security was insufficient, the condition attached to the order passed on 2-11-1944 was that imposed by the Court under O. 9, R. 13, Civil P. C. and had no effect in making the security bond in any way defective : 7 A. I. R. 1920 Pat. 660, *Rel. on.* [Para 7]

S. N. Seth — for Applicant.

M. L. Chaturvedi — for Opposite Party.

Cases referred :—

1. ('31) 1931 A. L. J. 1049 : 18 A. I. R. 1931 All. 727 : 54 All. 154 : 136 I. C. 609 (F. B.), *Ram Bharose v. Ganga Singh.*
2. ('20) 7 A. I. R. 1920 Pat. 660 : 5 Pat. L. J. 420 : 57 I. C. 300, *Shyam Lal Sahai v. Ram Narain Lal.*

**Order.** — This is a plaintiff's application in revision under S. 25, Small Cause Courts Act. It is directed against an order setting aside an *ex parte* decree and restoring the suit on certain conditions mentioned in the order of restoration.

[2] The relevant facts may be briefly stated. An *ex parte* decree for a certain sum of money was passed on 27-7-1944. On 2-8-1944 an application for setting aside the *ex parte* decree and restoration of the suit was filed by the defendant and it was supported by an affidavit. On the same day he filed another application praying that he might be permitted to furnish personal security in lieu of cash deposit. It appears that the Court granted the application for giving a personal bond as security in lieu of cash deposit and on 10-8-1944 the bond was filed. In due course notice was issued to the plaintiff and after considering the objections filed on behalf of the plaintiff the Court on 2-11-1944 set aside the *ex parte* decree and restored the suit on certain conditions. The learned Judge expressed the opinion that there was nothing on the record to show that the security was insufficient but the security bond was not properly worded. In view of this, the learned Judge felt that the defendant-applicant should be called upon to deposit the decretal amount in cash and this was made as one of the conditions for restoration. On 25-11-1944 an application was made by the plaintiff complaining that the order of the Court dated 2-11-1944 had not been carried out. In consequence of this, the plaintiff submitted that the application for setting aside the *ex parte* decree and restoring the suit must be dismissed. After hearing learned counsel for the parties, the learned Judge, on 23-12-1944, passed an order to the effect that the conditions attached to his order restoring the suit passed on 2-11-1944 had been duly complied with and in terms of the order the suit must be considered to be restored.

[3] The plaintiff has now come up in revision to this Court challenging the order of restoration. Technically, this application in revision is defective inasmuch as in terms it seeks the setting aside of the last order passed by the learned Judge on 2-12-1944 and does not specifically refer to the order of restoration which was passed on 2-11-1944 but the grounds taken in the application largely deal with the original order passed on 2-11-1944. I have accordingly heard learned counsel for the parties with regard to the merits of the original order dated 2-11-1944 as well.

[4] Learned counsel for plaintiff-applicant has strenuously contended that the mandatory provisions of S. 17, Provincial Small Cause Courts Act not having been complied with the Court below had no jurisdiction to set aside the *ex parte* decree. He has further contended that



the affidavit filed in support of the application for restoration of the suit was defective and was consequently not a piece of legal evidence on which the Court below could have acted as it did. In view of the sequence of events detailed above, it is quite clear that the application for restoration was filed on 2-8-1944 and the personal bond as security in compliance with the proviso to S. 17 (1), Small Cause Courts Act was filed on 10-8-1944. All this took place clearly within thirty days of the passing of the *ex parte* decree on 27-7-1944. Thereafter notice was issued to the plaintiff and after hearing learned counsel for both the parties the Court on 2-11-1944, as mentioned above, passed the order of restoration subject to certain conditions. No doubt one of the conditions attached to the order of restoration was that the defendant-applicant was directed to deposit the decretal amount in cash instead of the personal bond which he had been allowed to file on 10-8-1944. This, according to the learned Judge himself, was done simply because the security bond was not properly worded inasmuch as the surety had put in a condition that he would be liable only if money was not realised from the applicant (defendant). The learned Judge had in an earlier part of his order clearly indicated his view about the sufficiency of the security because he had said : "There is nothing on the record to show that the security is insufficient."

[5] In effect, therefore, the substitution of a cash deposit in place of the personal bond originally allowed by the Court to be filed was not, according to the learned Judge himself, on account of any insufficiency in the security filed but purely on account of a formal defect in the language used in the security bond. No compliance with the conditions affixed to the order of restoration of 2-11-1944 could possibly be effected within the thirty days of limitation counted from the 27-7-1944. It has been repeatedly held by this Court that the provisions of the proviso to S. 17, Small Cause Courts Act are mandatory. Again, it has been held in many cases both by this Court as well as other High Courts, that the security contemplated by the proviso may be furnished even after the application has been made provided it is forthcoming within the period of thirty days as provided by Article 164, Limitation Act. Further it has been held that even the giving of directions by the Court with regard to the nature of the security in lieu of cash deposit may also be postponed to any time within the thirty days of the period of limitation prescribed. Reference may be made here to a Full Bench decision of this Court in 1931 A. L. J. 1049.<sup>1</sup> It has been pointed out by the learned Judges in that case that the language of the proviso is

very unhappy and is incapable of literal application. The main question before the Full Bench related to the proper interpretation of the proviso to S. 17, Small Cause Courts Act. The conclusions reached by the learned Judges, after a survey of the relevant case-law and the examination of the language of S. 17, along with the proviso, may be briefly summed up thus :

[6] The applicant must present his application for setting aside the decree together with the security demanded before the expiration of the thirty days of limitation as provided by Art. 164, Limitation Act. If the security filed be in pursuance of a direction by the Court and the Court accepts the security without question and directs a notice to issue before limitation has expired, it, by necessary implication, gives a direction that the security furnished is sufficient to its mind. As observed by Mukerji J. at p. 1053 :

"A party cannot suffer by the act of a Court and, therefore, we must accept the position that the Court has given the direction, according to law, to the furnishing of the security actually furnished, where the Court instead of rejecting the application of the defendant directs that a notice should issue."

Again at page 1057 Boys J. observed:

"If filed within the thirty days and accepted by the Court expressly or impliedly by the issue of notice the application is a good application, though it will be open to the decree-holder to challenge the nature and sufficiency of the security and to the Court under O. 9 R. 13 to make such further conditions as it thinks fit."

At page 1059 Sulaiman A. C. J. observed:

"In the present case although the security was deposited without obtaining any previous direction the Court ordered notice to issue before the period expired. It must accordingly be deemed to have by implication given the necessary direction."

Of course, the question whether the security is sufficient and satisfactory need not be finally determined during the period of thirty days. Indeed, the plaintiff decree-holder may come in afterwards and challenge its sufficiency. The mere fact that it is found afterwards that the security was sufficient (insufficient?), would not make the deposit of the security within the time in any way defective."

[7] Reverting to the facts of the present case, the application for setting aside the *ex parte* decree was filed within the period of thirty days. The Court allowed the application for filing personal security on 8-8-1944 clearly within the period of limitation. The personal bond as security was filed by the applicant on 10-8-1944; this again was clearly within the period of limitation. Notice to the decree-holder opposite party was issued on 15-8-1944. This again was clearly before the limitation of thirty days had expired. In view of the principles laid down by the Full Bench, it seems to me that in this case the requirements of the proviso to S. 17 of the Act must be held to be fulfilled in reference to the application itself. As mentioned already, it was certainly open to the decree-holder to chal-



challenge the nature and sufficiency of the security and to the Court under O. 9, R. 13, Civil P. C., to lay down such further conditions as it thought fit. Viewed in this light, the order of the Court below dated 2-11-1944 may be considered to be the order of the Court passed under O. 9, R. 13, Civil P. C., and the conditions attached to this order to the effect that the decretal amount be deposited in cash and that Rs. 15 be paid by the applicant as damages to the opposite party by 25-11-1944 may be treated as conditions imposed by the Court under those provisions. That the Court had very wide discretion with regard to the imposing of such terms as a condition to the order of restoration as it thought fit before setting aside the *ex parte* order is clear from the provisions of O. 9, R. 13, Civil P. C.

[8] Reference might be made in this connection to the case in A. I. R. 1920 Pat. 660,<sup>2</sup> where two learned Judges of the Patna High Court had to consider the question as to the terms which the Court had power to impose under O. 9, R. 13, Civil P. C., as a condition for restoring the case for rehearing. It was observed at page 661 by Dawson-Miller C.J. (with whom Das J. agreed):

"It seems to me that the terms which the Court has power to impose as condition for restoring the case for rehearing are of a threefold nature. The Court may, first of all, impose conditions as to the payment of costs; it may, secondly impose conditions as to payment into Court and, in my opinion this covers the payment into Court of the decretal amount or some portion thereof or payment into Court of costs; and thirdly, it may impose other conditions as it may think fit . . ."

[9] The application filed by the plaintiff opposite party on 25-11-1944 to the effect that as the conditions imposed by the order dated 2-11-1944 had not been complied with the application for restoration must be deemed to stand dismissed, or should be dismissed and the final order passed by the Court on 23-12-1944 declaring that the earlier order had been duly complied with and, therefore, the suit stood restored are fully consistent with the view of the matter I have taken above. It follows, therefore, that there is no question of a want of jurisdiction of the Court below in passing the order of restoration that it has done. To my mind, in this case there is no question of an extension of limitation for compliance with any of the requirements of the proviso to S. 17, Provincial Small Cause Courts Act. The result, therefore, is that I dismiss this application with costs.

V.S.B.

*Application dismissed.*

\* A. I. R. (34) 1947 Allahabad 127 [C. N. 62]

MALIK AND WALI ULLAH JJ.

*Ghulam Mohiuddin and others—Plaintiffs—Appellants v. Hafiz Abdul Rashid and others—Defendants—Respondents.*

First Appeal No. 205 of 1943, Decided on 9th May 1946, from decree of Additional Civil Judge, Cawnpore, D/-4th January 1943.

(a) Mahomedan Law — Wakf — Construction — Intention of wakif to dedicate his entire property — Item not specifically referred to, held must also be included.

Where the intention of the wakif under the wakf deed was to dedicate his "entire property" owned by him at the time by way of wakf :

*Held* that the mere fact that one particular item (the amount of the decree in dispute at the time of deed) was omitted, was merely accidental ; as such, the omission should not be allowed to limit the plain meaning of the words "all my property". The decree in dispute therefore must be included in the dedication evidenced by the deed of wakf. [Para 13]

(b) Mahomedan law — Wakf — Wakf of going concern — Assets or outstandings of concern must necessarily be deemed to be comprised in wakf. [Para 15]

(c) Mahomedan Law — Wakf — Wakf of money decree is not valid.

The Courts in India have during recent years exhibited a general tendency, particularly since the Wakf Act of 1913, to hold wakf of any property valid and this is in accord with the two all-important guiding principles *viz.*, the necessity and wants of social life of the times. The Courts in administering Mohamadan Law are entitled to take into account the circumstances of actual life and the change in the people's habits and modes of living. The preponderance of authority is in favour of the view that the wakf of movable property, Government promissory notes, shares in joint stock companies and even money, at any rate funded money is valid. [Para 36]

It cannot be denied, however, that in the case of a simple money decree, money may or may not be ultimately realised from the judgment-debtors ; at any rate the recovery of any amount under the decree is problematical. In such circumstances it seems difficult to hold that the dedication of the amount due under the decree, in other words the right to recover the money due under it, should be observed to be in any sense of the terms, a dedication of a permanent nature. "The decree" no doubt is "property" but so far as the permanence of the dedication of such property is concerned — and dedication must be permanent — it is more apparent than real. Property in this case is of too precarious a nature to admit of a permanent dedication by the person who was entitled to execute the decree : *Case law and Commentaries reviewed*

[Para 36A]

*C. B. Agarwala and Ishaq Ahmad—*for Appellants.

*M. A. Kazmi—*for Respondents.

*Cases referred :—*

1. ('02) 24 All. 190, Abu Sayid Khan v. Bakar Ali.
2. ('81) 9 C. L. R. 66, Fatima Bibee v. Arif Ismailjee Bham.
3. ('35) 1935 A.L.J. 1317 : 23 A.I.R. 1936 All. 15 : 58 All. 464 : 160 I.C. 354, Amir Ahmad v. Mohammad Ejaz Husain.
4. ('39) 1939 A.L.J. 138 : 26 A.I.R. 1939 All. 319 : I. L. R. (1939) All. 322 : 183 I. C. 379, Nosh Ali v. Shamsun Nesa Bibi.



5. ('10) 33 Mad. 118 : 4 I. C. 136, Kadir Ibrahim Rowther v. Mahomed Rahumad Ulla Rowther.
6. ('05) 10 C. W. N. 449, Kulsom Bibee v. Golam Hossein Casim Ariff.
7. ('07) 9 Bom. L. R. 1337, Bai Fatmabai v. Gulam Husen.
8. ('44) 31 A. I. R. 1944 Mad. 504 : I. L. R. (1945) Mad. 276, Abdul Sattar Ismail v. Abdul Hamid.
9. ('29) 16 A. I. R. 1929 Oudh 97 : 3 Luck. 521 : 117 I. C. 385, Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam.
10. ('32) 19 A.I.R. 1932 P. C. 13 : 6 Luck. 556 : 59 I. A. 1 : 136 I. C. 385 (P. C.), Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam.
11. ('36) 23 A. I. R. 1936 Oudh 213 : 11 Luck. 735 : 160 I.C. 495 (F.B.), Mt. Rahiman v. Mt. Baqridan.
12. ('42) 29 A. I. R. 1942 Sind 137 : I. L. R. (1942) Kar. 179 : 205 I. C. 449, Hashimi Haroon v. Gounsalishah.
13. ('30) 17 A. I. R. 1930 Bom. 191 : 54 Bom. 358 : 127 I. C. 401, Abdulsakur Haji Rahimtulla v. Abubakkar Haji Abba.
14. ('05) 2 C. L. J. 218, Sakina Khanum v. Laddan Saheba.
15. ('08) 31 Bom 250, Banubi v. Narsingrao Ranojirao.

**Wali Ullah J.**—This is a plaintiffs' appeal against the decree passed by the learned Additional Civil Judge in suit No. 54 of 1922 dismissing the claim for a declaration that the plaintiffs, as *mutawallis* of the *wakf* made by Sheikh Abdul Latif, were entitled to withdraw the amount of Rs. 13,800 which is in deposit in Court as the decretal amount of decree No. 97 of 1927 of the Court of the 1st Subordinate Judge, Cawnpore.

[2] The dispute in this case relates to the right of withdrawal from the Court of the sum of Rs. 13,800 abovementioned. The decree in suit No. 97 of 1927 was obtained by Bavis Company through its proprietor Rai Bahadur Bhagwan Das against Whitfield Company of Mohammad Raza and Haji Maula Bux. Sheikh Abdul Latif deceased, who was admittedly the sole proprietor of the West End Leather Works, purchased this decree from Rai Bahadur Bhagwan Das by means of a sale deed dated 27th October 1933.

[3] The case of the plaintiff-appellants was that they were the trustees under the deed of wakf dated 7-4-1936 executed by Sheikh Abdul Latif alias Mathu deceased; that Sheikh Abdul Latif dedicated all his properties for religious and charitable purposes specified in the deed and so the trustees or Mutawallis are entitled to the aforementioned decretal amount in deposit in Court.

[4] The suit was mainly contested by Hafiz Abdul Rashid, defendant 1, and his transferee, Maulvi Ahmad Abdul Halim, defendant 2. Of them defendant 1 claims to be an heir of Abdul Latif deceased and as such entitled to the money in deposit. Defendant 2 claims to be a transferee of half of the rights and interest of defendant 1. The defence set up was to the effect that the deed of wakf dated 7-4-1936 was not executed

by Sheikh Abdul Latif while he had a sound disposing mind and was in his proper senses. It was further alleged that the so-called deed of wakf was vitiated inasmuch as Abdul Latif was suffering from *marz-ul-maut* at the time when he is alleged to have executed it. Next, it was contended by the defendants that the decree in question was not included in the wakf property; it was contended in the alternative, that if it be deemed to be so included, such a decree could not be legally dedicated as wakf under the Muhammadan law.

[5] Certain facts which are necessary for appreciating the points involved in this appeal may be set out here. Admittedly Abdul Latif purchased the decree in suit No. 97 of 1927 from R. B. Bhagwan Das on 27-10-1933. Thereafter he put the decree into execution. Haji Maula Bux as judgment-debtor filed objections in the execution proceedings and was successful in the Court of first instance. An appeal was, however, filed by Abdul Latif in the High Court and the appeal was allowed on 11-1-1935. Haji Maula Bux thereupon preferred an appeal to the Privy Council. While the appeal was pending Abdul Latif executed the wakf deed dated 7-4-1936 and it was registered on 17-4-1936. Subsequently on 10-6-1936 Abdul Latif died at Mussoorie. In connection with the substitution of the names of the legal representatives of Abdul Latif, Haji Maula Bux impleaded four persons, namely plaintiff-appellant 1, the head trustee under the deed of wakf, and defendants 1, 3 and 4 of the present suit. It appears that one of the four persons sought to be impleaded as the legal representative of Abdul Latif raised objections against the impleading of the others and the High Court ultimately impleaded all of them without deciding who was actually the legal representative. Later, the appeal in the Privy Council was decided on merits and it was dismissed. It is clear from the record that in the appeal before the Privy Council only Ghulam Mohi-uddin, plaintiff-appellant 1, the head trustee had put in appearance.

[6] After the dismissal of the appeal he executed the decree for costs in the appeal before the Privy Council. Subsequently the trustees under the wakf of Abdul Latif the plaintiff-appellants executed the decree of suit No. 97 of 1927 and the judgment-debtors thereupon deposited Rs. 13,800 in Court. When the plaintiff-appellants wanted to withdraw that amount from Court Haji Abdul Rashid and Abdul Hamid, defendants 1 and 2, raised objections. The learned Civil Judge thereupon directed the parties to get their claims decided by the Civil Court by instituting proper regular suits. As the result of the directions given by the learned Civil Judge the



parties filed two suits; suit No. 54 of 1942 was filed by the plaintiff-appellants while suit No. 69 of 1942 was filed by the defendant-respondents 1 and 2. Both the suits were heard together with the consent of all the parties and evidence was all recorded in suit No. 69 of 1942 but it was agreed between the parties that both the oral and documentary evidence of the two suits was to be read in both the suits. After the conclusion of the hearing of the two cases and indeed after the conclusion of arguments it transpired that the Inspector of Stamps submitted a report to the Court that in suit No. 69 of 1942 the court-fee paid was insufficient. The plaintiffs of that suit failed to make good the deficiency in court-fee determined by the Court with the result that the plaint in suit No. 69 of 1942 had to be rejected as insufficiently stamped. Thus the Court below had to determine only the issues raised in suit No. 54 of 1942. The learned Civil Judge in considering the issues raised in suit No. 54 of 1942 has adopted and as he calls it '*appropriated*' to suit No. 54 of 1942 issues Nos. 2, 4, 5 and 6 of suit No. 69 of 1942 and determined them also along with the issues specifically framed in suit No. 54 of 1942. In order to understand issues 4 and 5 of suit No. 69 above-mentioned, it is necessary to state some antecedent events. Defendants 1 and 2, shortly after the death of Abdul Latif, applied for a succession certificate in their favour but their application was dismissed by the Court of first instance and their appeal to the High Court was equally unsuccessful. In view of these decisions the plaintiff-appellants raised the contention that these decisions operated as *res judicata* so as to bar the defence set up by defendants 1 and 2. It was further contended that the defendants Nos. 1 and 2 were estopped from denying the validity of the wakf.

[7] On a consideration of the materials on the record, the learned Civil Judge held and we think rightly that defendants 1 and 2 were not estopped from impeaching the validity of the wakf deed in question. He further rightly held that the decision of the Court dealing with the application for a succession certificate to defendants 1 and 2 could not operate as *res judicata* so as to shut out the pleas set up by the defendants in the present case in regard to the validity of the wakf. On the two questions; (1) whether the deed of wakf dated 7-4-1936 was duly executed by Abdul Latif according to law after intelligently following the contents thereof and (2) whether Abdul Latif was at the time the deed of gift was executed in *marz-ul-maut*, the learned Civil Judge, after a careful consideration of the evidence and the circumstances of the case, unhesitatingly came to the conclusion

that the wakf deed was duly executed by Abdul Latif at a time when he was in his normal good health and was possessed of a sound disposing mind. He further found that there was no truth in the defendants' contention that Abdul Latif was either seriously ill or was not in his proper senses when the deed of wakf was executed. He thus definitely negatived the defendants' contention that the deed could be attacked on the ground of *marz-ul-maut*. In this connection the learned Civil Judge found that Abdul Latif was only suffering from diabetes for some two years prior to his death. On the questions whether the decree in suit No. 97 of 1927 was included in the property dedicated under the deed of wakf, and if so, whether it could be legally made the subject of a wakf under Mohammadan law, the learned Civil Judge found against the plaintiffs. He held substantially on an interpretation of the deed of wakf that the decree in suit No. 97 of 1927 was not dedicated and made a wakf of under the deed. In view of certain rulings referred to in his judgment, he also recorded a finding that a decree for money such as the one passed in suit No. 97 of 1927 could not be the subject of a valid wakf under the Mohammadan law. He accordingly expressed the view that if the decree in question be deemed to have been included in the wakf property the wakf to that extent would be invalid. In view of the findings recorded by him, the learned Civil Judge came to the conclusion that the plaintiff-appellants had no right to recover the decretal amount in question. He accordingly dismissed the suit with costs.

[8] Learned counsel for the plaintiff-appellants has argued only two substantial points in this appeal; (1) whether the decree in question was included in the dedication evidenced by the deed of wakf dated 7-4-1936 and (2) whether such a decree could be a valid subject of wakf under the Mohammadan Law. No other contentions have been raised in the course of the hearing of this appeal.

[9] We now proceed to determine the aforementioned two main questions which arise in this appeal.

[10] The determination of the question whether the decree in suit No. 97 of 1927 was dedicated under the wakf deed dated 7-4-1936 depends upon the proper interpretation of the deed in question. This deed is Ex. C of the record. Learned counsel for the parties have drawn our attention to relevant portions of this deed and have commented at length on the same. Learned counsel for the plaintiff-appellants has contended that the whole trend of the deed clearly indicates that it was the *intention* of the executant to make a wakf of the whole of the property owned and possessed by him and not only a part of it.



[11] Learned counsel has invited our attention to the passage in para. 1 of the deed :

"The details of the entire property and *Imlak* in my proprietary possession and occupation upto this time are given at the foot hereof."

He has further emphasized the passage in para. 2 :

"With the same idea, I, the executant, had, for a long time, been thinking of making a wakf in respect of my *entire property*."

Next, he has laid great stress upon these words in the same paragraph :

"Now I do make, and have, of my own accord and choice, willingly made perpetual and *Paivandi wakf* with regard to all the *Imlak* and movable and immovable property belonging to me as per specification given below with all the inherent and adventitious rights appertaining thereto, without the exception of anything, right or portion, for charitable and pious purposes . . . ."

Next, it has been emphasized on behalf of the appellants that the contents of paragraph 11 of the deed which specifically deal with the dedication of the Ammunition and Boot Factory in Mohalla Farraskhana, called the *West End Leather Works*, make it abundantly clear that the executant intended to dedicate every possible asset of the factory called the West End Leather Works. Lastly learned counsel for the appellants has drawn our attention to paras. 14 and 15 of the deed which, in substance, provide for all the litigation and proceedings in Courts and Government Departments including original suits, appeals or execution cases or miscellaneous matters to be carried on in the name of the President of the Committee of *mutawallis*. It may be mentioned here in passing that the deed provides that the wakif himself shall be the first mutawalli of the wakf so long as he remains alive and that thereafter a committee of five persons called the Committee of Mutawallis of the wakf of Abdul Latif *alias* Mathu shall be in charge of the wakf. Learned counsel for the appellants has strongly contended that the expression "all the *imlak* and movable and immovable property belonging to me as per specification given below" properly interpreted means "all my property of which I give details below." Learned counsel contends that the omission of a specific mention of the decree in dispute must be held to be due to a mere accidental omission of an item of property and as such it should not affect or in any way limit the meaning of the words "all my property." The argument essentially comes to this: unquestionably the dominant intention of the wakif was to dedicate every conceivable item of property that he possessed or owned at the time. That being the position, the mere fact that one particular item of property—the amount of the decree in dispute—was omitted, must be due to a mere accidental

slip and, as such, it can have no material effect on the dedication.

[12] On the other hand, learned counsel for the respondents has drawn our attention to the expressions in paras. 1 and 2 which speak of property as specified or described at the foot of the document. He has also invited our attention to paras 10, 11, 14 and 15 and, in that connection, has submitted that these paragraphs do not contain any reference to the decree in question, but if there had been any intention to include the decree in the dedication these paragraphs would have, in all probability, made a specific reference to the decree. Learned counsel has contended that the document appears to have been very carefully drawn up and the fact that there is no specific mention of this decree along with other items of property dedicated, is very significant. It would go to show, so contends the learned counsel for the respondents, that Abdul Latif perhaps thought in April 1936 (when litigation regarding the execution of the decree was pending in the Privy Council) that the decree in dispute was too precarious an item of property to be made a wakf of and that would explain the omission of a specific mention of this item of property. In substance, therefore, his contention is that the omission to refer to the decree in question in the deed of wakf would appear to be intentional and not merely accidental.

[13] We have listened to the able arguments addressed to us by the learned counsel for the parties and we have carefully considered the relevant provisions of the deed both in the original as well as in its translation. Obviously, the intention of the wakif as expressed in the deed would constitute the determining factor. There can be no doubt whatsoever that the wakif, Sheikh Abdul Latif had been contemplating the dedication of his "entire property" by way of wakf for it is recited in para. 2 of the deed that "I, the executant, had, for a long time, been thinking of making a wakf in respect of my entire property." The general trend of the deed in all the material portions of it undoubtedly exhibits the intention of the executant to make a wakf of the whole of his property. It seems to us that even when the stage was reached when the details of the property referred to earlier in the deed were to be given, the details of only the movable and immovable property were set out. In the body of the deed there is everywhere reference to the "property" in a most comprehensive language, e.g., "*Kul Jaidad va Imlak*" (the entire property and *Imlak*) but the details at the end refer only to two heads i.e. *Tafsi Jaidad Mankula* (detail of the moveable property) and (2) *Tafsil Jaidad Ghair Mankula* (i.e. detail of the immoveable property). In view of these



peculiar features of the deed in question, we are inclined to consider that the omission of a specific reference to the decree in question was merely accidental; as such the omission should not, in our judgment, be allowed to limit the plain meaning of the words "all my property". In this view of the matter, it follows that the decree in suit No. 97 of 1927 is included in the dedication evidenced by the deed of wakf.

[14] Mr. C. B. Agarwala, the learned counsel for the appellants, has raised a further contention in regard to the dedication of *the decree* in question. He has argued, in the alternative, that the decree must be deemed to be included in the dedication if the matter be looked at from a slightly different point of view. Assuming that the decree is not one of the items of property which was '*directly*' or specifically dedicated by wakif, so contends the learned counsel, there can be no doubt whatsoever that the Ammunition Boot Factory, called the West End Leather Works, was the subject-matter of wakf and the validity of wakf of this item of property has never been challenged by anyone. There was, thus, a valid wakf of a going business concern i. e., the West End Leather Works. The decree in question was purchased by Sheikh Abdul Latif for Rs. 4,500 on 27-10-1933. The evidence of plaintiffs' witness Zahid Ali, supported as it is by the account books of the West End Leather Works makes it perfectly clear that the decree was purchased from Rai Bahadur Bhagwan Das out of the funds of the West End Leather Works. It is significant that the entry with regard to this amount of Rs. 4,500 was made in the account books of the firm and not in the *personal khata* (account) of Sheikh Abdul Latif which he maintained in the Bahis (or account books) of the West End Leather Works. This would go to show that the wakif intended the decree to be part of the assets of the firm. Learned counsel in this connection also relies upon Para. 11 of the deed of wakf and contends that the outstandings of the firm must necessarily be deemed to have been dedicated. It would follow, therefore, that the decree in question is included in the dedication in an indirect manner, i. e., as an asset of the going concern known as the West End Leather Works.

[15] Learned counsel for the respondents has, however, contended that even if it be taken for granted that the decree was included in the dedication, it would not be valid because it is nowhere directed by the wakif that the proceeds of the decree shall be utilized in a particular kind of investment. The contention of the learned counsel is that, in the absence of such directions, the dedication of the amount realisable under the decree would be void in law. We

shall, however, consider this objection in connection with the second question regarding the validity of a wakf of a "*decree*" under the Mohammedan law. At this stage, we are concerned with the question of the factum of dedication of the decree, directly, or indirectly through the wakf of the going concern i. e. the West End Leather Works. Looked at as an asset, or outstanding of the firm (i. e. the West End Leather Works), the decree in question must necessarily be deemed to be comprised in the wakf of the firm. In our judgment, this contention of the learned counsel has considerable force and we would record a finding in favour of the appellants on this ground. The result, therefore, is that, in our judgment, the plaintiff-appellants have succeeded in establishing that the decree in dispute was comprised in the wakf created by Sheikh Abdul Latif.

[16] The next question which we have to consider is whether a wakf of *the decree* in question, in the circumstances indicated above, is valid under the Mohammedan law. Obviously this question does not arise if only the second alternative contention of the learned counsel for the appellants be considered. In such a case there is no wakf of "*the decree*" as such. There is certainly a wakf of the "*going concern*" known as the West End Leather Works and along with such a wakf all the assets, including all the outstandings of the firm (which included the decree in question) must be included. The validity of the dedication of the West End Leather Works has not been called in question in this case. Clearly, therefore, the contention that wakf of the decree is defective in law would be pointless inasmuch as, *ex hypothesi*, there is no dedication of the decree as such, but this question certainly does arise in connection with the appellants' first contention, namely that the decree in question was itself the subject-matter of wakf.

[17] The question whether a simple *money-decree*, such as is the case here, can be validly the subject-matter of a wakf under the Mohammedan Law is not at all free from difficulty. In the course of their arguments learned counsel for the parties have invited our attention to a large number of rulings as well as to a number of standard works on Mohammedan Law and we shall in a moment deal with the more important of the authorities brought to our notice.

[18] The first case of this Court to which reference should be made is the case in 24 ALL. 190,<sup>1</sup> decided by a Bench of two learned Judges, Banerji and Aikman JJ. of this Court. The question before their Lordships was whether a wakf of "*movable property*" including "*money*" was



valid under the Mohammedan Law. After hearing very able and erudite arguments from the learned counsel on both sides and after a long and careful consideration of the texts and the case law cited before them, their Lordships came to the conclusion that such a wakf may be validly constituted. The view taken by the Calcutta High Court in 9 C. L. R. 66,<sup>2</sup> was expressly dissented from. Their Lordships referred to the serious conflict of authority on the question which they had to decide. To quote their own words:

"We have carefully considered those authorities. The conflict between them is bewildering. Some assert that such an endowment as the present is absolutely void; others, that it is valid when customary; and others again—and these are in the majority — that it is valid without any restriction. Not only is there a conflict between different jurists, but we find different and irreconcilable opinions attributed to the same jurists by different commentators."

After examining the authorities, particularly the *Fatwa Qazi Khan*, *Durrul Mukhtar*, *Umdat-ul-Kari* (a commentary on Sahib-ul-Bukhari by Allama Aini) and the well-known works of Ameer Ali and Wilson, their Lordships expressed the view that the question was not by any means free from difficulty. They however considered that the preponderance of authority was in favour of the view that such an endowment holds good.

[19] The next case of this Court which has been referred to us is that in 1935 A. L. J. 1317.<sup>3</sup> That was a case of a wakf created by a *grove-holder of his rights as such* and the question was whether the rights of a grove-holder could be the subject-matter of a valid wakf under the Mohammedan Law. It was decided by two learned Judges of this Court, Sulaiman C. J. and Bennet J. At page 1318 it was observed:

"No doubt the essence of a wakf is its permanent character. Any property which is temporarily or for a limited period or without right in the possession of the wakif cannot be validly dedicated because such a dedication can never be of a permanent character. But it does not follow that the subject-matter of the wakf must necessarily be the full proprietary interest in immovable property . . . . . This Court in 24 All. 190<sup>1</sup> held that according to the Musalman law a wakf of even *movable property* could be validly constituted. The learned Judges expressly dissented from the view expressed in Calcutta. There is even authority for the proposition that *wakf of moneys and shares in joint stock companies* and other modern forms of investments might well be the subject matter of a valid wakf."

All difficulties that might have arisen under the strict Mohammedan Law are now removed so far as wakfs governed by the Musalman Wakf Validating Act are concerned . . . . . It obviously follows that a wakf can be made of movable just as well as of immovable properties and that in fact '*any property*' can be made wakf of provided there is '*a permanent dedication*' of it, . . . . ."

[20] The last case of this Court cited before us is that of 1939 A. L. J. 138,<sup>4</sup> decided by a Bench of two learned Judges of this Court. In

that case their Lordships considered the question whether dedication of money is recognized by Mohammedan Law. Their Lordships expressed the view that the question was by no means free from difficulty and that there was great conflict of judicial opinion on the point. After considering various authorities, particularly the case in 24 All. 190<sup>1</sup> and the relevant passages from Ameer Ali's Mohammedan Law and Wilson's Mohammedan Law, their Lordships observed at p. 141:

"It will be observed that investment in Government securities and shares in companies etc., is a common form of investment recognized in the present times. Such investments yield regular income which can be expended on the maintenance of the objects of the wakf. If, on the other hand, a sum of money itself is dedicated and it is to be spent on the maintenance of the objects of the wakf it will be exhausted before long and it cannot be said that the property dedicated is of a reasonably permanent character as required by law."

With reference to the particular question which arose in that case viz. whether a valid wakf could be created by a Mohammadan widow of her unpaid dower debt, their Lordships observed at p. 142:

"The dower debt was no doubt due to the lady but it was at the option of the residuaries to pay that sum or not. It was not a tangible property available to Mst. Fahimo and she certainly had no control over it. The recovery of that sum was problematical and any dedication of such property could not be recognised under the accepted principles of Mohammadan Law. In 33 Mad. 118,<sup>5</sup> it was held that dedication of a decree was invalid. This principle will apply with greater force to the present case. In our judgment the rule of law laid down in 24 All. 190<sup>1</sup> mentioned above is not applicable to the present case at all."

[21] Turning to the cases decided by other High Courts in India, we have the case in 33 Mad. 118,<sup>5</sup> in which two learned Judges of the Madras High Court held that:

"The right to recover money under a decree cannot be made the subject of a wakf in the absence of a custom authorising such appropriation."

Their Lordships went on to observe:

"Even if the proposed subject of the wakf be regarded as the money which may (problematically) be recovered under the decree, we think that the weight of authority and argument is opposed to the plaintiff's contention that the wakf is valid."

Their Lordships referred to the conflicting authorities on the question whether a valid wakf could be created of a movable property which was not accessory to land and agreed with the view expressed by the Calcutta High Court in 10 C. W. N. 449<sup>6</sup> at p. 494, and by the Bombay High Court in 9 Bom. L. R. 1337.<sup>7</sup>

[22] Next reference may be made to the case in A. I. R. 1944 Mad. 504,<sup>8</sup> in which two learned Judges of the Madras High Court had to consider the question whether the dedication of movable property was lawful under Mohammadan Law. Their Lordships pointed out that before the passing of the Musalman Wakf Validating Act it was the view of that Court and of other



High Courts in India, except the Allahabad High Court, that there could not be a valid waqf of movable property unless it were accessory to land or were allowed because of certain traditions concerning the prophet and the sacred writings or there was a custom to make a waqf of it. It was, however, held that :

"The definition of waqf in the Musalman Waqf Validating Act (1913) as a permanent dedication of "any property" indicates that a waqf can be made of movables. The definition in the Act is of general application and a waqf of movables even for objects other than those specified in the Act would be valid."

It would be observed that in this latter case the contention of the learned counsel to the effect that the view expressed in 33 Mad. 118<sup>5</sup> was rendered obsolete by the passing of the Mussalman Waqf Validating Act (1913) was accepted.

[23] Reference has also been made to two cases decided by the Oudh Chief Court. The first case is that in A. I. R. 1929 Oudh 97,<sup>9</sup> decided by two learned Judges of that Court. They had to consider the question of the validity of a waqf of Government promissory notes under the Imamia Law. They, however, examined the question with reference to the provisions of the Hanafi Law as well. At page 111 it was observed:

"There has been a considerable difference of opinion in High Courts in India as to whether under the Hanafi law the waqf of shares in companies is or is not valid."

After considering the principles which govern the validity of such a waqf under the Hanafi Law as contained in Ameer Ali's *Mohammadan Law*, 4th edition, pp. 257-264, 503-505 and p. 264, their Lordships came to the conclusion that the waqf was valid. This case went up in appeal to their Lordships of the Privy Council and their Lordships' decision is reported in A. I. R. 1932 P. C. 13.<sup>10</sup> It was found in that case that the waqf of the promissory notes in question had been recognized by the members of the family for three quarters of a century or more, and the income of the fund had been applied, at all events in the main, consistently to charitable purposes. It was accordingly held that the waqf was valid. Finally their Lordships observed at page 21:

"Under the circumstances, their Lordships find it unnecessary to attempt a solution of the interesting problem of Mahomedan Law which was propounded to the Chief Court."

[24] The next case of the Oudh Chief Court to which reference has been made is that in A. I. R. 1936 Oudh 213,<sup>11</sup> decided by a Full Bench of three learned Judges of the Oudh Chief Court in which it was held that a valid waqf cannot be made in respect of the rights of a usufructuary mortgagee in an immovable property. The waqf was held invalid for two reasons: (1) that the waqf was not the owner of the mortgaged property and had therefore no permanent control over that pro-

perty and (2) that an usufructuary mortgage itself is not valid according to Mohammadan Law.

[25] The next case to which reference may be made is that in A. I. R. 1942 Sind, 137,<sup>12</sup> decided by two learned Judges of the Sind Chief Court. That was a case which arose out of a suit under S. 92, Civil P. C. With reference to the contention urged before their Lordships that there can be no valid waqf by a Sunni Musalman of a debt due to him under a mortgage deed inasmuch as such a debt was not property of a kind of which a Sunni Musalman could make valid waqf, it was observed that the case in A. I. R. 1936 Oudh 213<sup>11</sup> had no application to the facts before them, but that the case in 24 All. 190<sup>1</sup> was much more in point and it was against the contention pressed before them. It must, however, be noted that these observations were obiter as the question did not legitimately arise in the case before them.

[26] The last case which has been brought to our notice is that in A. I. R. 1930 Bom. 191,<sup>13</sup> decided by Mirza J. At page 196 the learned Judge observed:

"The dedication made in clause 3 of the will is at least partly that of money. Prior to the Waqf Validating Act there were conflicting rulings of various High Courts in India as to whether a valid waqf could be made of money. Our Court in common with the High Courts of Calcutta and Madras inclined to the view that a waqf cannot validly be made of moveable property unless the moveable property was accessory to some immovable property of which waqf was being made or unless the waqf of movables was allowed by custom: see 9 Bom. L. R. 1337,<sup>7</sup> 10 C. W. N. 449<sup>6</sup> and 33 Mad. 118.<sup>5</sup> The High Court of Allahabad had held that a waqf of movables would be valid even apart from the considerations set out in the rulings of these three Courts: see 24 All. 190<sup>1</sup>. In my judgment the controversy is now set at rest by the definition of waqf under the Waqf Validating Act 1913 which speaks of the permanent dedication of "any property". "Any property" would include movable as well as immovable property.

It was thus held that under the Waqf Validating Act, a waqf can be constituted by a permanent dedication of "any property" which expression would include money and other movable and immovable property. The same view has been taken by the Calcutta High Court in 2 C. L. J. 218.<sup>14</sup> In 31 Bom. 250,<sup>15</sup> a Division Bench of the High Court of Bombay, Jenkins C. J. and Beaman J. dealing with the question whether the dedication of moveable property including money was valid under the Mohammadan Law expressed itself in the following terms:

"As to whether property of this kind can legitimately form the subject of a waqf, we need only say that movables, in our opinion, may; and if movables, there seems no sound reason in these days, to exclude from that category, funded moneys."

[27] Apart from the case law briefly reviewed above, it will be profitable to refer here to the views expressed by some of the well-known writers on Mohammadan Law. Dealing with the



question with regard to the property which may be subject matter of a valid waqf under the Mohammadan Law, Sir Abdur Rahim at page 307 of his Mohammadan Jurisprudence (1911 edition) has expressed himself thus :

"The accepted juristic theory is certainly very narrow as to the forms of property which can be properly settled in waqf. The property must first of all answer the description of *mal* or tangible property, as in the case of a gift so that waqf of a mere right to the usufruct such as a rent charge is not allowed. In the next place it must be productive or capable of being used without the substance being consumed. This rule excludes moveable property generally including money. A few specified articles such as war horses, camels and swords are taken out of the rule by force of certain traditions, and such moveables with respect to which a prevalent practice (*ta'ammul*) to make waqf has been established in the particular country in which the grantor resides are exempted from the operation of the rule. It has been held in 10 C. W. N. 449,<sup>6</sup> and 9 Bom. L. R. 1337<sup>7</sup> and 33 Mad. 118,<sup>5</sup> following 9 C.L.R. 66,<sup>2</sup> and dissenting from 24 All. 190,<sup>1</sup> that waqf of shares in a joint stock company and of Government promissory notes is not valid. This view is undoubtedly in agreement with the strict conception of waqf in Mohammadan Law, but it may be a matter for further consideration whether it is in accord with the principles of construction and application of Mohammedan law as enunciated by the Privy Council. As the validity of a simple gift of Government securities and of shares in companies is well established, it may be argued that the same principle should be analogically applied to waqfs, especially as the doctrine of *riba* has never been recognized by the British India Courts. The above restrictions regarding the property which may be made the subject of waqf are based on juristic deduction and not on any positive text, and it may also be said that they should not be followed to the letter as they are obviously unsuited to the modern circumstances of life."

[28] Again, dealing with the principles on which rules of Mohammadan juristic law are applied by Anglo Indian Courts, Sir Abdur Rahim at page 43 observes as follows :

"Necessity and the wants of social life are, as we shall see, the two all important guiding principles recognized by Muhammadan jurisprudence in conformity to which laws should be applied to actual cases, subject only to this reservation, that rules, which are covered by a clear text of the Quran, or a precept of indisputable authority, or have been settled by agreement among the learned, must be enforced as we find them. It seems to me beyond question that, so long as this condition is borne in mind, the Court in administering Muhammadan laws is entitled to take into account the circumstances of actual life, and the change in the people's habits and modes of living."

[29] From the two quotations set out above, it is clear that, according to Abdur Rahim, all restrictions regarding the property which may be made the subject of waqf being based on juristic deduction and not on any positive text may be modified if not altogether done away with in the light of the necessity and the wants of social life of the present generation and these are, according to him, the two all important guiding principles recognised by Muhammadan jurisprudence.

[29A] "Under the Mussulman Law", says the Rt. Hon'ble Syed Ameer Ali in his monumental work on Mohammedan Law, Vol. I 4th Edn., page 246.

"there is absolutely no restriction on the dedication of any kind of property so long as it admits of yielding permanent benefit either in itself or by renewal from time to time or by conversion into something else which admits of the same possibility. Thus every kind of property, immovable as well as movable, every object in fact which is capable of being possessed or being reduced to possession actually or constructively, equally with interest in trade, commerce, or investments is a fit and lawful subject of waqf."

"It will be seen, therefore, that the validity of a waqf does not depend on the nature of the property dedicated, but on the probability or presumption of permanent benefit being derived from it by any mode of dealing of which it is capable, or by converting it into something else. It is only where the object is absolutely unfit for being turned into profitable use, that its dedication falls to the ground . . . . . But an object which was likely to be consumed in use and which, therefore, had no permanency in itself, can be sold and the proceeds invested in any manner customary among people in order to yield a permanent return, without any restriction to its renewal from time to time. For example, even eatables are fit subjects of waqf for they can be sold and the price so obtained laid out "in business" when a waqf is made of actual coin (*dirhems* and *dinars*), it is to be invested with the like object.

[30] Again, after examining the relevant authorities he observed thus at page 255 :

"The sunni doctrine as to the validity of a waqf of movables including money is repeated in the same terms in the *Tas-hil*, the *Jouharat-un-Nayyereh*, the *Ghait-ul-Bayan* and other works. From these principles it will be seen that under the Hanafi Law, the waqf of Government securities, shares in companies, debentures and other stock, is perfectly lawful and valid. The doubt, which one or two of the ancient Hanafi doctors had expressed as to the validity of the waqf of certain kinds of movable property in contradistinction to certain other things, was the outcome of the primitive and archaic conditions of society, and was founded on the notion that as perpetuity was essential to the validity of waqfs, it could hardly be secured by the dedication of movable things generally. But as the Mussulman communities progressed in material civilisation and commerce developed, it came to be universally recognised that the waqf of everything, "to which practice appertains among mankind or which it is customary in any particular locality to do so, is valid."

[31] Again, at p. 257 referring to the decision of the Calcutta High Court in 10 C. W. N. 449,<sup>6</sup> where it was held that the waqf of shares in companies is not valid under the Mohammadan law, the learned author maintains that this decision was based upon an erroneous and strained construction of the principles recognised by Mohammadan law and observes :

"This case has been followed without examination of the authorities by the Bombay High Court in 9 Bom. L. R. 1337<sup>7</sup> and the Madras High Court in 33 Mad. 118.<sup>5</sup>"

The learned author continues :

"There can be no question that funded moneys and shares in commercial companies constitute property (*mal*) within the meaning of the Mahommedan law; they are capable of being renewed and are, therefore,



'mal mutakawwim, something over which the rights of ownership can be exercised; and as they form the subject of common dealing they are not *extra commercium*. Again, they yield, or can yield permanent benefit either as shares or by other forms of investment. Then it may be asked how is it that a waqf of shares in commercial companies is invalid?"

Then again at p. 263 he observes:

"Since the days of Abu Yusuf, the legal conception regarding articles that may validly be made waqf has made a great advance. He did not recognise the validity of the waqf of buildings and trees apart from the land; that is now universally admitted by the Hanafi jurists. The waqf of money (dirhems and dinars) which he discountenanced on the ground of analogy (kyas) as likely to be consumed in use, is now admitted as lawful, wherever it is in vogue, and it is declared that where money is dedicated its value should be laid out in muzaribat (business) or baza' at (commerce). . . . No sacramental value or significance is attached to the waqf of any particular kind of property in contradistinction to another. What the Judge has to see is whether the article dedicated is capable of yielding permanent benefit by renewal from time to time, or by investment of the proceeds, when sold, in business or commerce (muzaribat or baza' at). It is a mistake to attach canonical importance to the statements and arguments in the Hedaya, for many of the doctrines set forth in it are long since exploded, or have been considerably modified."

[32] Finally, at p. 264 the learned author makes the following observations:

"The validity of the waqf of movables including moneys is accepted without question among the Shafeis, the Malikis, the Hanbalis, and the Shiahhs." And Shafei has held, "says the Hedaya," that the waqf of everything from which benefit can be derived consistently with the retention of the corpus is valid; and whatever can be lawfully sold (this gives an indication to the sense in which the word taamul is used in this connection) may be lawfully dedicated, for what is capable of yielding profit (from changes of form) resembles lands, horses and arms."

"The waqf of money is now common everywhere among Mahomedans from Algeria to India and Burmah. The Shrine at Mecca and at Kerbela, the endowments at Ajmere, Hossainabad (Lucknow) and many of the mosques and religious institutions all over the country, are largely supported by the income of moneys invested in Government securities, which people have come to regard as safer and more permanent than even land. In Egypt, the income of many important endowments created in modern times is, for the most part, derived from shares in commercial companies."

Money invested in Government or Municipal stock is employed by the State or local authorities, as the case may be, generally in productive work, and a share of the profits derived therefrom is received by the investors under the name of dividends or interest. The income derived from money invested in commercial companies stands in the same category. And the waqf of moneys invested in trade or commerce (baza'at) has been recognised as lawful for centuries."

[33] Again, while dealing with the Shiah Law relating to wakf, at p. 503 the learned author clearly indicates that there is a close resemblance between the Hanafi Law and Shiah Law regarding the conditions relating to the subject of waqf. He observes:

"According to the ancients, the waqf of anything which did not exist in specie was not valid, e. g. the

waqf of a debt payable to a person was not regarded as valid, because it was a thing, in their opinion, not existing in specie."

After referring to Sharaya-ul-Islam and Jawahir-ul-Kalam on the question of the subject of wakf he quotes the following passage from *Mafatih*:

"The waqf of a *dayn* (debt) which is a thing indeterminate, is not valid by reason of there being no certainty or identity of the same."

Then he deals with the modern doctrine regarding this question and says that in accordance with the altered conditions of society Shiah lawyers have upheld the validity of waqfs of moneys and of profits. Lastly, at p. 505 he observes:

"Similarly the waqf of a debt which is determinate and capable of specification has been recognised to be valid."

[34] Tayabji in his well known book on Muhammadan Law, 3rd edition (1940) dealing with the subject matter of waqf states the law thus at p. 577:

"The texts provide with great particularity which classes of property besides immovable property may be the subject of waqf, and are not agreed with reference to money and things consumed by use. The Courts have followed the Waqf Act, 1913, under which waqf is defined as the permanent dedication of 'any property'." The learned author makes it quite clear, however, that in view of the discussion of the authorities, waqf of money or any other property, even apart from the Waqf Act of 1913 was valid.

[35] In Mulla's Mahomedan Law the law is stated as follows at page 153:

"The subject of waqf under the Waqf Act may be 'any property.' A valid waqf may, therefore, be made not only of immovable property, but also of movables, such as shares in joint stock companies, Government promissory notes, and even money."

[36] In view of the authorities referred to above it is quite clear that Courts in India have during recent years exhibited a general tendency, particularly since the Waqf Act of 1913, to hold waqf of any property valid and this is undoubtedly in accord with what Sir Abdur Rahim characterises as the two all-important guiding principles viz. the necessity and wants of social life of the times. The Courts in administering Muhammadan Law are entitled to take into account the circumstances of actual life and the change in the people's habits and modes of living. It is further clear that the preponderance of authority is undoubtedly in favour of the view that the waqf of movable property, Government promissory notes, shares in joint stock companies and even money at any rate funded money is valid.

[36a] Reverting to the specific question whether the right to recover money under a decree could validly be the subject of waqf, it must be said at once that most of the authorities referred to above do not specifically deal with this



question. Reference to the question of the waqf of a debt in Ameer Ali's *Mohammadan Law* set out above is not also very helpful. He has given the ancient view and also indicated the modern view, but there is no reference to any particular authority in support of the modern view. It is no doubt true that since the Waqf Act of 1913 Courts try and support validity of waqfs of any kind of property. It cannot be denied, however, that in the case of a simple money decree, like the present money may or may not be ultimately realised from the judgment-debtors; at any rate the recovery of any amount under the decree is problematical. In such circumstances it seems difficult to hold that the dedication of the amount due under the decree, in other words the right to recover the money due under it, should be observed to be in any sense, of the terms, a dedication of a permanent nature. "The decree" no doubt is "property" but so far as the permanence of the dedication of such property is concerned—and dedication must be permanent—it must be conceded that it is a more apparent than real. Property in this case is of too precarious a nature to admit of a permanent dedication by the person who was entitled to execute the decree. We accordingly find it difficult to hold that the view of the learned Civil Judge viz., that a decree for money cannot be the subject of a valid waqf under the *Mohammadan Law*, was erroneous. But, in view of the finding recorded by us that the waqf of the going concern viz. the West End Leather Works embraced this decree as well as an asset of that firm, it must follow that the decree in question is included in the dedication in an indirect manner and in view of that finding the appeal must succeed.

**Per Malik J.**—I agree to the order proposed.

[37] **By the Court.**—The result, therefore, is that this appeal is allowed, the decree of the Court below is set aside and suit No. 54 of 1942, is decreed with costs throughout. A declaration is granted to the plaintiffs that they have a right to withdraw the amount which is in deposit in Court in connection with the execution case No. 97 of 1927, and the execution case No. 8 of 1934.

V.B.B.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 136 [C. N. 63]**  
WALI ULLAH J.

*Popular Bank of India—Applicant v. Cheranji Lal and another — Opposite Party.*

Civil Revn. No. 237 of 1945, De'd on 1-8-1946, against order of Sm. C. C. Judge, Allahabad, D/-13-12-1944.

Contract Act (1872), S. 74 — Compromise decree — Decree awarding full claim but providing that decree-holder would accept certain lesser sum if paid within fixed time—Provision is not penal—No question of granting relief in execution can arise—Civil P. C. (1908), S. 47.

A compromise decree awarded the full claim of the decree-holder but provided that the decree-holder would accept a certain lesser sum in full satisfaction if paid within a fixed time. On default by the judgment-debtor the decree-holder sought to execute the decree for the full amount:

*Held* that there was no question of penal stipulation in the decree. The decree-holder was agreeable to make certain concessions in favour of the judgment-debtor in case the judgment-debtor was prompt in making payment of the smaller amount. Consequently no question of granting any relief against forfeiture would arise: 13 A. I. R. 1926 All. 278, *Foll.* [Para 1]

*S. B. L. Gour*—for Applicant.

*B. R. Avasthi*—for Opposite Party.

*Case referred :—*

1. ('26) 24 A. L. J. 210 : 13 A. I. R. 1926 All. 278 : 91 I. C. 790, *Kishan Prasad v. Kunj Behari Lal.*

**Order.**—This is an application in revision under S. 25, Small Cause Courts Act, filed by the judgment-debtor against the order rejecting the objection filed by him. It appears that the opposite party Pt. Chharanji Lal Misra, put forward a claim of Rs. 692-13-0. Eventually the case ended in a compromise and on 3-8-1943 a joint application containing the terms of the compromise was filed and the suit was decreed in terms of the compromise. Thereafter the decree-holder applied for execution of the decree. Objections were filed on behalf of the judgment-debtor that part of the amount sought to be realised from him by means of the execution of the decree could not be realised inasmuch as the stipulation in the deed of compromise allowing an increased amount on default in making the payment within the period of time specified amounted to a penalty and the Court should grant relief against the penal provisions in the deed of compromise. The terms of the compromise in substance were that the entire claim was to be decreed but that if Rs. 200 were realised by the encashment of the cheque passed by the judgment-debtor to the decree-holder on the date of the compromise and if Rs. 375 plus half the costs of the suit were paid by the judgment-debtor to the decree-holder by 18th August 1943, the decree-holder would be prepared to forgo the balance of the decree. As explained in the last sentence of the compromise,

"the decree-holder would accept Rs. 375, plus costs as in an ex parte decree in lieu of his whole claim if this amount is paid by 18th August 1943."

The whole question therefore which the Court below had to decide and which has been argued before me is whether, in view of the terms of this compromise, it can be said that the claim for recovery of an amount larger than that made up of Rs. 200, plus Rs. 375, plus half costs was by way of a penalty. Considering the terms of the compromise it seems to me perfectly obvious that there was no question of a penal stipulation in the deed of compromise. It seems



to me that by reason of the compromise the decree-holder was agreeable to make certain concessions in favour of the judgment-debtor in case the judgment-debtor was prompt in making the payment of the smaller amount mentioned in the deed of compromise.

[2] Learned counsel for the opposite party has cited the case in 24 A. L. J. 210.<sup>1</sup> The facts of that case were similar to those of the present case. A Bench of two learned Judges of this Court held in that case that the provision regarding the payment of the larger amount in case of default in payment of the smaller amount within the specified time was not by way of penalty. A number of other cases decided by other High Courts in India have been cited before me but, in view of the decision of a Bench of two learned Judges of this Court, it is not at all necessary to refer to any of them.

[3] I am satisfied that the order of the Court below dismissing the objections preferred by the judgment-debtor in this case was fully justified. I accordingly dismiss this application in revision with costs.

K.S.

*Revision dismissed.*

### A. I. R. (34) 1947 Allahabad 137 [C. N. 64]

ALLSOP AND MATHUR JJ.

*Muhammad Azam Khan—Plaintiff—Appellant v. Hamid Shah and another—Defendants—Respondents.*

First Appeal No. 62 of 1943, De'd on 29-1-1946, from order of Civil Judge, Azamgarh, D/-14-9-1942.

(a) Muhammadan law—Wakf—Validity—Provision for maintenance of poor relations—Substantial sum out of income of dedicated property earmarked for charitable purposes—Wakf held valid.

The object of the wakf was to provide maintenance for poor relations and dependants. Out of the income of a few hundred rupees of the dedicated property, a substantial sum was specifically earmarked for charitable purposes (Ashra Moharram and Majlisses held in commemoration of the martyrs of Karbala and also for feeding of the poor in the month of Ramzan):

Held that the deed was a valid wakf: 11 A. I. R. 1924 All. 223, *Foll.* [Para 5]

(b) Mussalman Waqf Validating Act (1913), S. 3 (a)—Family—Nephews—Family includes nephews of settlor irrespective of whether they live in settlor's house or whether settlor is responsible for their maintenance.

The word "family" in S. 3 (a) is not restricted to only those persons residing in the house of the settlor for whose maintenance he is mainly responsible, but the word is intended to be used in its broad popular sense; persons descended from one common progenitor and having a common lineage, e. g. nephews of the settlor and their descendants, are included in the term irrespective of whether they live in the settlor's house, or whether the settlor is responsible for their maintenance: 17 A. I. R. 1930 All. 169, *Foll.* [Para 6]

(c) Mussalman Waqf Validating Act (1913), S. 3 Proviso—Ultimate benefit for poor, etc.—Im-

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plied reservation of — Wakf deed creating '*wakf fi sabi lillah*' in perpetuity and reserving part of income for charitable purposes—No express provision for spending income of dedicated property towards charity on extinction of line of grantor and grantee—Reservation of ultimate benefit for poor etc may be implied.

When a deed of wakf provides "*dawam ke liye rah khuda me sadkatan wa hasbatan lillah waqf kar diya*" which is the same thing as creating a *wakf fi sabi lillah* in perpetuity, and a portion of the usufruct of the property has also been reserved for pious and charitable purposes, but it is nowhere expressly mentioned that after the extinction of the family of the grantees and the grantor the income from the property will be spent for the purposes of the charity, the inference is that the wakf intended by implication to reserve the ultimate benefit for the purposes of charity, etc.: 19 A. I. R. 1932 Cal. 93, *Rel. on*; 22 A. I. R. 1935 All. 616, *Explained*: [Para 7]

In the event of the extinction of the line of the beneficiaries and the grantor the doctrine of cypres would then apply and the income after making deductions for charitable purposes will be applied for the benefit of the poor or to objects or as near as possible to the objects which failed: 23 A. I. R. 1936 All. 404, *Rel. on*. [Para 7]

*P. L. Banerji and Mukhtar Ahmad*—for Appellant.

*S. N. Verma and J. N. Chatterji*—for Respondents.

*Cases referred:—*

1. ('23) 45 All. 152:11 A. I. R. 1924 All. 223:69 I. C. 836, *Mukarram v. Anjuman-un-nissa*.
2. ('30) 52 All. 368:17 A. I. R. 1930 All. 169:123 I. C. 369, *Ghazanfar Husain v. Ahmadi Bibi*.
3. ('35) 1935 A. L. J. 647:22 A. I. R. 1935 All. 616:155 I. C. 416, *Baqa Ullah Khan v. Ghulam Siddique Khan*.
4. ('32) 59 Cal. 402:19 A. I. R. 1932 Cal. 93:133 I. C. 657, *Masuda Khatun Bibi v. Mohammad Ibrahim*.
5. ('36) 1936 A. L. J. 231:23 A. I. R. 1936 All. 404:163 I. C. 344, *Rugia Begam v. Suraj Mal*.

**Mathur J.** — The suit out of which this appeal arises was brought by the plaintiff-appellant Raja Mohammad Azam Khan for a declaration that the deed of wakf dated 17-7-1920, was invalid. There was also a prayer for possession over the zamindari property and the house which were the subject-matter of the wakf. The said deed of wakf was executed by the father of the plaintiff Raja Mohammad Shah in favour of his nephews Babu Hamid Shah and Babu Maqbool Ahmad Shah the defendants-respondents. It was mentioned in the deed of wakf that as Mahmud Khan the father of the defendants met his death by drowning and left the defendants unprovided the object of the wakf was to provide maintenance for the defendants and their heirs. Out of the income of the dedicated property, Rs. 120 annually was to be spent for the expenses of Ashra Moharram and the Majlisses held in commemoration of the martyrs of Karbala and also for feeding of the poor in the month of Ramzan. The plaintiff's claim was that the said deed of wakf was invalid, because the wakif Raja Mohammad Shah never had any intention of making and did not in fact make a permanent wakf under the Muham-



madan law, because there was no residuary gift in favour of charity, and because the waqf had never been acted upon. The plaintiff claimed that the property was still a part of the assets of his father, Raja Mohammad Shah, and he was entitled to the declaration sought for and to the possession of the property in dispute.

[2] The defence was that the deed of waqf dated 17-7-1920, created a real waqf and was perfectly valid according to Muhammadan law, that it has all along been acted upon, and that the suit was barred by limitation.

[3] The learned Civil Judge has dismissed the suit holding that the deed was valid and operative and divested the creator of the waqf, Raja Mohammad Shah, of the ownership of the property in dispute, that the waqf was acted upon, and that the claim was barred by time.

[4] It is contended on behalf of the plaintiff appellant that the waqf in question did not fulfil the requirements of S. 3 of the Act 6 [VI] of 1913 (Mussalman Waqf Validating Act) and therefore it was invalid, that the waqf never seems to have contemplated the contingency of the extinction of his family, and therefore there was no reservation of the income of the property for pious and charitable purposes, that the lower Court has wrongly applied the doctrine of cypres in the case of a Muhammadan waqf, and that the claim was not barred either by twelve years or three years limitation.

[5] After hearing the learned counsel for the parties, I have come to the conclusion that this appeal has got no force, and must be dismissed. The arguments addressed to us are based on the assumption that Act 6 [VI] of 1913 applied to the present case, and if the provisions of that Act were not complied with the waqf would be invalid. It must however be noted that if a deed of waqf is valid according to Muhammadan law as it stood and was being interpreted before the passing of Act 6 [VI] of 1913, there would be no necessity to investigate whether the provisions of that Act had been complied with or not. The deed of waqf dated 17-7-1920, which is in dispute in this case does not mention anywhere in the body of the document that it was waqf ala-ul-aulad, or that it was executed according to the provisions of Act 6 [VI] of 1913. There can be no doubt that the waqf in dispute is both for the benefit of the settlor's family and for charity. Such a gift according to Muhammadan law as interpreted by the Privy Council would be valid if there was a substantial dedication of the property to charitable uses at some period of time or other and that it was not for the aggrandisement of the family or that the gift to charity was illusory having regard to the small amount reserved for that purpose or from its uncer-

tainty or remoteness. In my estimation when out of an income of a few hundred rupees a substantial sum was specifically earmarked for charitable purposes the waqf would not be invalid even when a part of the income was set apart for the maintenance of the members of the family. In this connection it will be right to point out that the maintenance of poor relations and dependents is also a valid object of waqf: *vide* 45 ALL. 152,<sup>1</sup> and the Principles of Muhammadan Law by Sir Dinshaw Mulla, p. 156, twelfth Edition. In this view of the matter, the deed of waqf dated 17th July 1920 was a valid waqf and the plaintiff's suit was bound to fail.

[6] If, however, it is found that the document in dispute constituted a waqf ala-ul-aulad, it will have to be considered whether the provisions of Act 6 [VI] of 1913 which validated such a waqf had been complied with. It has been argued that by the said Act it was made lawful for a person professing the Mussalman faith to create a waqf which in all other respects was in accordance with the provisions of the Mussalman Law for the maintenance and support wholly or partially of his family, children or descendants; and that no waqf could be created in favour of the nephews as they did not come within the descriptions of the family, children or descendants. The matter is however concluded by a Bench decision of this Court in 52 ALL. 368,<sup>2</sup> where it was held that the word "family" in S. 3 (a), Mussalman Waqf Validating Act was not restricted to only those persons residing in the house of the settlor for whose maintenance he was mainly responsible, but that the word was intended to be used in its broad popular sense; persons descended from one common progenitor and having a common lineage, *e.g.*, nephews of the settlor and their descendants, were included in the term, irrespective of whether they lived in the settlor's house, or whether the settlor was responsible for their maintenance. I am in full agreement with the view that is expressed and do not find any force in this argument.

[7] The next contention is that there was no residuary gift in favour of charity. It is no doubt true that it is nowhere expressly mentioned that after the extinction of the family of the grantees and the grantor the income from the property will be spent for the purposes of the charity. It is however clear from the wordings of the proviso to S. 3, Mussalman Waqf Validating Act (Act 6 [VI] of 1913) that the ultimate benefit must in each case be expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman Law as religious, pious, or charitable purpose of



a permanent character. In 1935 A. L. J. 647,<sup>3</sup> it was held that where the words "*waqf fi sabi lillah*" have been used and a waqf has been created in perpetuity, and there is provision for the appointment of the mutwallis for all time to come, and a portion of the usufruct of the waqf property has been reserved for pious and charitable purposes, and the waqif had in contemplation the possible extinction of the line of his descendants who were to be the principle recipients of the profits of the waqf property, the irresistible conclusion is that the waqif intended by implication to reserve the ultimate benefit for the purposes enumerated in the proviso. It may be mentioned that the deed of waqf, in the present case also provides "*dawam ke liye rah khuda me sadkatan wa hasbatan lillah waqf kar diya*" which is the same thing as creating a *waqf fi sabi lillah* in perpetuity. A portion of the usufruct of the property has also been reserved for pious and charitable purposes. The only difference is that no provision has expressly been made for the appointment of a mutwalli if the lines of both the grantor and the grantee were extinct, because it has been laid down in the deed of waqf that the mutwalliship of the waqf property shall never be out of the family of the executant. The learned Civil Judge has no doubt remarked that this expression does not mean that there will be no mutwalli after the family of the grantor was extinct. But I do not think that interpretation can be rightly put. It also appears that the grantor never contemplated the possibility of the extinction of the line of the beneficiaries. But I do not think that it was ever contemplated by that Bench to lay down that these were the essential conditions in order to justify an inference that the waqif intended by implication to reserve the ultimate benefit for the purposes of charity etc. In my judgment when the waqf has been made in the name of God, has been created in perpetuity, and a portion of the waqf property has been reserved for pious and charitable purposes the same result should follow: *vide* 59 Cal. 402.<sup>4</sup> In the event of the line of the beneficiaries and the grantor both being extinct a question would certainly arise as to how the income of the property after deducting the amount of Rs. 120 which has been expressly provided for charitable purposes should be devoted. In my judgment the doctrine of cypres would then apply and the income will be applied for the benefit of the poor or to objects or as near as possible to the objects which failed. In 1936 A. L. J. 231,<sup>5</sup> Sir Shah Sulaiman, C. J. observed :

"Where the waqif has indicated his intention that his object is to benefit his family, and also religious, pious or charitable purposes, it can be implied that

there is an ultimate reservation for such purposes, particularly so when he has provided that a part of the income should be applied to such purposes during his own lifetime. If one object, namely, the maintenance of his descendants, fails, there is no reason why the other object should also fail, and no reason whatsoever why the whole income should not be devoted to the remaining object as indicated."

[8] I am thus prepared to hold that even as a waqf ala-ul-aulad under the provisions of Act 6 [VI] of 1913 the waqf deed in question would not be invalid. In any view of the case, the plaintiff's suit was rightly dismissed. I do not think it is necessary to express any opinion on the question of limitation. The appeal fails and I would dismiss it with costs.

**Allsop J.**—I concur.

**By the Court.**—The appeal is dismissed with costs.

V.B.B.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 139 [C. N. 65]**

**YORKE J.**

*Har Prasad—Applicant v. Emperor.*

Cri. Revn. Appln. No. 1418 of 1946, De'd on 28-10-1946, from order of Sessions Judge, Aligarh, D/- 9-10-1945.

(a) Criminal P. C. (1898), S. 195—Commissioner acting as Election Judge under S. 24 (1), U. P. Municipalities Act is not "civil, revenue or criminal Court" within Ss. 195 and 476 and cannot make a complaint under S. 195 (1)—But complaint made by him can be treated as one under S. 190 (1) (a)—Criminal P. C. (1898), Ss. 476 and 190.

The Commissioner acting as Election Judge under S. 24 (1), U. P. Municipalities Act (2 (II) of 1916) is not a "civil, revenue or criminal Court" within the meaning of Ss. 195 and 476 and hence has no power to make a complaint under S. 195 (1) in respect of an offence committed in election proceedings before him.

[Para 5]

But the complaint made by him in respect of an offence committed in election proceedings before him can be treated as one under S. 190 (1) (a) and as such can be entertained by a Magistrate. There is nothing in S. 190 which requires that a complaint of fact must be a private complaint in the sense of being made by a private person and not some one presiding over a Court which does not come within the scope of Ss. 476 and 195 e. g. the Commissioner sitting as an Election Judge and presiding over an Election Court under S. 24 (1), U. P. Municipalities Act. The words "Except as hereinafter provided" in S. 190 do not affect the position because there is nothing in the succeeding sections which prevents an Election Judge being treated as a private person: 25 A. I. R. 1938 All. 449, *Rel. on.*

[Paras 7 and 8]

Criminal P. C. — ('46-Com.) S. 195, N. 17; S. 476, N. 3; S. 190 N. 19 pt. 1.

(b) Criminal P. C. (1898), S. 190 — Magistrate is not confined to sections mentioned in complaint — He can frame charge under other sections if facts proved establish charge under those sections.

It is always open to a Court before which a complaint is lodged in which only one or two sections are named to frame a charge under a third or fourth section if in his opinion the facts proved establish a charge



under different sections from those named in the original complaint. [Para 9]

Criminal P. C.—('46-Com.) S. 190 N. 19 pt. 9.

*Sir Tej Bahadur Sapru and Ajudhia Prasad*—  
for Applicant.

*Deputy Government Advocate*—for the Crown.

Case referred:—

1. ('38) 1938 A. L. J. 528 : 25 A. I. R. 1938 All. 449 :  
176 I. C. 960, *Tara Singh v. Emperor*.

**Order.** — This is an application in revision asking this Court to quash certain proceedings before a Magistrate entertained by him on a complaint made by an election Court. A similar application had been made to the Sessions Judge of Aligarh but was rejected by him.

[2] The facts are as follows : There was a contested election for one of the wards in the Aligarh municipality. The present applicant Har Prasad was one candidate, while, the other was Ram Lal. It is stated that Har Prasad was elected and thereupon the unsuccessful candidate filed an election petition which came for hearing before the Commissioner of the Agra Division, Mr. Pedley, who was invested with the powers of an election Court under S. 24 (1), U. P. Municipalities Act, 1916. The learned Commissioner allowed the petition and set aside the election of the applicant Har Prasad and declared a casual vacancy. He also declared Har Prasad incapable of being elected for a period of five years.

[3] In the course of the election petition, Ram Lal made an application to the Commissioner stating that on inspection of the record it appeared that Har Prasad had fabricated or abetted the fabrication of false evidence by the substitution of forged signature slips for the original and genuine slips. The Commissioner, Mr. Pedley was satisfied that there was ground for inquiry into this complaint and he framed a complaint which purported to be a complaint under S. 476, Criminal P. C., to the effect that the respondent Har Prasad did during the month of January and on one or more of the following dates, the 9th, 11th, 26th and 27th or on 1-2-1945 at Aligarh himself fabricate or abet the fabrication of false evidence by the substitution of forged for one or more genuine signature slips relating to voters Nos. 986, 1203, 332, 1641, 566, 1616, 2258, 1145 and 1026 among the election papers of Ward No. V, Non-Muslim Aligarh. This complaint he forwarded along with the complete judicial record of the election petition case to the District Magistrate, Aligarh, for disposal by himself or by a competent Magistrate deputed by him according to law. The District Magistrate made the case over to Mr. H. A. Kidwai, Magistrate first class, for disposal. This was on 16-4-1945.

[4] On 31-5-1945 an application was made in the Court of the Magistrate to the effect that

the Commissioner, as Election Judge, was neither a civil, revenue nor a criminal Court and as such was not competent to make any complaint for offences referred to in S. 195, Criminal P. C. The Magistrate had treated or was prepared to treat the complaint as one of offences under Ss. 466 and 468, Penal Code. The learned Magistrate disallowed this application and was prepared to proceed with the hearing of the case when a fresh application was made on 24-9-1945 to the Sessions Judge. In that Court it was contended, first of all, that the Election Judge was not authorised to proceed under S. 476 and a complaint made by him under S. 195 (1) was accordingly incompetent, *ultra vires* etc., and that therefore the lower Court, that is the Magistrate, had no jurisdiction to entertain the complaint. It was further contended that the Magistrate was not empowered to go behind the terms of the complaint filed by the Commissioner, that is, the Election Judge, under S. 476, Criminal P. C., read with S. 195. These, I suppose, were in the nature of alternative pleas. The learned Sessions Judge, after some discussion of the legal position, held that the Election Judge was not empowered to file a complaint under S. 476 (read with S. 195) but that the complaint in question could be maintained by the Magistrate under S. 190 as if made by a competent Court as provided in S. 195. I am not absolutely clear what he meant by this expression of opinion. In the result, he dismissed the application and hence this present application in this Court.

[5] It is contended, and I think with force, that the Commissioner of the Aligarh Division sitting as an Election Judge under the provisions of the Municipalities Act, was not a Court within the meaning of Ss. 476 and 195, Criminal P. C. These two sections, which are in a sense interconnected, speak of a civil, revenue or criminal Court, *vide* S. 476 (1) and S. 195 (2), and it certainly appears to me that an Election Judge cannot be brought within the ambit of the term "civil, revenue or criminal Court." It follows that the complaint made by the Commissioner as Election Judge was not one which could be entertained by the Magistrate under S. 195 (1), Criminal P. C.

[6] The only other provision which could apply is S. 190. Section 190 (1) provides as follows :

"Except as hereinafter provided, any Presidency Magistrate, District Magistrate, or Sub-Divisional Magistrate, and any other Magistrate, specially empowered in this behalf, may take cognizance of any offence—

(a) Upon receiving a complaint of facts which constitute such offence."

[7] It is contended that the complaint sent by Mr. Pedley as Election Judge to the District Magistrate of Aligarh could not be treated as a complaint under S. 190 (1) (a), and the apparent two bases of this argument are first, that Mr.



Pedley was sitting as a Court and a complaint which is made by any sort of Court cannot be treated as a complaint under S. 190 (1) (a) made by a private person; secondly, that in the case of a complaint made by a private person, the complainant is liable, if the accused is acquitted, to a suit for malicious prosecution and obviously a complaint of this kind would with difficulty be used as the foundation for such a civil action. In my judgment, there is no real force in either of these contentions. If the contentions are sound, a person who commits perjury or any other offence before an election Court must go off scot free unless the opposite party is prepared to institute a private complaint under S. 193, Penal Code. But I do not see why an Election Judge should be debarred from making such a complaint even though the complaint is to be treated as not made by a Court but as made only by the presiding officer of the Court under S. 190. Moreover there is nothing in S. 190 of the Code unless it be the words "Except as hereinafter provided" which lays it down that a complaint of facts must be a private complaint in the sense of being made by a private person and not some one presiding over a Court of a kind which does not come within the scope of ss. 476 and 195. That view was taken by my brother Allsop in 1938 A. L. J. 528,<sup>1</sup> where it was held that there was nothing in S. 190 to prevent a Sub-Divisional Magistrate from taking cognizance of an offence that happened to be reported to him by a Civil Judge or an officer who presides in a Court of justice. It was also stated that the Civil Judge being a complainant it is not necessary that he should be examined before the Magistrate who takes cognizance of the complaint (*vide* S. 200 (aa), Criminal P. C.). However, even if he ought to be examined and is not examined, "that would amount to an irregularity which would not vitiate the whole trial."

[8] In my judgment the principle of this decision is clearly applicable and the Magistrate was perfectly competent to entertain this complaint under the provisions of S. 190 (1) (a), Criminal P. C. The words "Except as hereinafter provided" do not affect the case because there is nothing in the succeeding sections which prevents an Election Judge from being treated as a private person.

[9] As regards the sections under which the Magistrate trying the case may choose to frame charges against the applicant, that is a matter entirely in his discretion. It is always open to a Court before which a complaint is lodged in which only one or two sections are named to frame a charge under a third or fourth sections if in his opinion the facts proved establish a charge under a different section or sections

from those named in the original complaint. I find no force in this application and dismiss it accordingly.

G.N.

*Application dismissed.*

# A. I. R. (34) 1947 Allahabad 141 [C. N. 66] FULL BENCH

ALLSOP AG. C. J., MATHUR AND SANKER  
SARAN JJ.

*Narendra Singh Ju Deo — Applicant v. Junior Secretary, Board of Revenue — Opposite Party.*

Misc. Case No. 389 of 1942, Decided on 1-4-1946.

Stamp Act (1899), S. 2 (24) — Owner by deed transferring property to trustees — Trustees to manage same on owner's behalf during his life time and to make certain arrangement on his death — Deed not executed for distribution of property — Owner reserving power of revocation to himself — Deed held was trust and not settlement — Stamp Act (1899), Art. 64.

Where, by a deed, the owner of a property transferred it to trustees who were to manage it on his behalf during his life time and were to make certain arrangement in the event of his death and the deed taken as a whole could not be regarded as one executed for the purpose of the distribution of the property and the general intention of the owner, who reserved the power of revocation to himself, was that the property should remain in the hands of the trustees for some time and they should deal with it in the manner in which he would have dealt with it if he had not created the deed:

*Held* that the deed was a trust and not a settlement. [Para 1]

Stamp Act—('45-Com.) S. 2 (24), N. 6, Art. 64, N. 2.

*K. N. Katju and B. L. Dikshit* — for Applicant.

*N. P. Asthana* — for Opposite Party.

*Mansur Alam* — for the Crown.

## Opinion of the Full Bench.

**Allsop Ag. C. J.**—This is a stamp reference. The matter has been referred to us by the Chief Controlling Revenue-authority under S. 57, Stamp Act, 1899. A reference was made to it by the Collector suggesting that the instrument with which we are concerned was a settlement and not a trust, as it has been held to be by the Chief Inspector of Stamps. The Chief Controlling Revenue-authority is of the opinion that the deed is a trust and not a settlement, but they expressed some doubt upon the subject. In our opinion, the document is not a settlement. The owner of the property transferred it to three trustees who were to manage it on his behalf during his life time and were to make certain arrangement in the event of his death. There are certainly certain directions about the manner in which the trustees are to dispose of the income of the property and about gifts which they are to make to his daughters by way of dowry in the event of their marriages. We do not think that the deed taken as a whole can be regarded as one executed for the purpose of the distribution of the owner's property. He reserved the



right of revocation to himself, and it seems quite clear to us that his general intention was that the property should remain in the hands of the trustees for some time and that they should deal with it in the manner in which he would have dealt with it if he had not created a deed of trust.

[2] A copy of our judgment shall be sent to the Revenue-authority under the provision of S. 59 (2), Stamp Act, 1899.

V.R.

*Reference answered.*

**A. I. R. (34) 1947 Allahabad 142 [C. N. 67]**  
MULLA J.

*Municipal Board, Jhansi v. Mt. Hans Mukhi Devi.*

Cri. Ref. No. 1424 of 1945, De'd on 27-9-1946, made by District Magistrate, Jhansi.

(a) U. P. Municipalities Act (2 [II] of 1916), S. 307 — Prosecution for disobedience to notice under S. 186 — Criminal Court has power to consider validity of notice — S. 321 is no bar — U. P. Municipalities Act (2 [II] of 1916), S. 321.

Where the accused is prosecuted before a Criminal Court under S. 307 for disobedience to a notice issued under S. 186, the Criminal Court has power to go into the question of the legality of the notice under S. 186 and is not debarred from doing so by S. 321 : 30 A. I. R. 1943 All. 123 (F. B.), *Rel. on.* [Para 4]

(b) Criminal P. C. (1898), S. 438—Accused prosecuted under S. 307, U. P. Municipalities Act for disobeying notice under S. 186 of that Act and acquitted—Appeal though competent not preferred—Reference under S. 438 invoking revisional powers of High Court cannot be accepted—That long period had elapsed since issue of notice under S. 186, U. P. Municipalities Act was itself sufficient for refusing retrial — Court making reference should bear in mind limitations on revisional powers of High Court put by S. 439 (4) — Criminal P. C. (1898), S. 439.

The accused was prosecuted under S. 307, U. P. Municipalities Act for disobedience to a notice issued under S. 186 of that Act and was acquitted. The Crown did not appeal against the finding of acquittal though it was open to it to do so. The District Judge made a reference under S. 438, Criminal P. C., to the High Court invoking its revisional powers on the ground that the finding of acquittal recorded by the Magistrate was wrong. It was not suggested that there was any irregularity or illegality in the trial itself :

*Held* that (1) the reference could not be accepted as the object which was sought to be achieved by invoking the revisional powers of the High Court could and ought to have been sought by means of an appeal against the finding of acquittal which was always open to the Crown. [Paras 2, 6]

(2) the Court making a reference under S. 438 asking the High Court to exercise its revisional powers must bear in mind the limitations put upon those powers by S. 439 (4). [Para 2]

(3) the fact that a long period had elapsed since the issue of notice under S. 186 for disobedience of which the accused was prosecuted and acquitted was itself sufficient for not ordering a retrial. [Para 6]

Criminal P. C. — ('46-Com.) S. 438, N. 8, pts. 5, 19.

*S. N. Verma* — for Applicant.

*P. C. Chaturvedi* — for Opposite Party.

*Deputy Government Advocate* — for the Crown.

*Case referred : —*

1. ('43) 1943 A. L. J. 103 : 30 A. I. R. 1943 All. 123 : I. L. R. (1943) All. 317 : 206 I. C. 38 (F. B.), *Brij Behari Lal v. Emperor.*

**Order.** — This is a reference by the learned District Magistrate of Jhansi. It arises out of a case in which the opposite party, Mt. Hans Mukhi Devi, was prosecuted by the Municipal Board, Jhansi, for an offence under S. 307, Municipalities Act. The case was tried by a Bench of Honorary Special Magistrates who acquitted her. The reference was directed against that finding of acquittal. The recommendation is that the finding of acquittal should be set aside and the case should be sent back for retrial.

[2] I must say at the very outset that I cannot accept this reference because the object which is now sought to be achieved by invoking the revisional powers of this Court could and ought to have been sought by means of an appeal against the finding of acquittal which was always open to the Crown. It is necessary to mention here that the subordinate Courts in making references under S. 438, Criminal P. C., asking this Court to exercise its revisional jurisdiction often seem to ignore the limitation put upon that power by sub-s. (4) of S. 439, Criminal P. C., which runs as follows :

"Nothing in this section applies to an entry made under S. 273, or shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction."

[3] In the present case it appears that a notice was issued to Mt. Hans Mukhi Devi by the Medical Officer of Health, Jhansi, asking her to demolish a portion of her building constructed by her. She did not comply with that notice and was consequently prosecuted for having committed an offence under S. 307, Municipalities Act (II [2] of 1916). Her defence was that she had made the constructions in accordance with a plan which she had submitted to the Municipal Board and which had been approved by the Board. She further contended that the notice issued by the Medical Officer of Health purporting to be under S. 186, Municipalities Act was an illegal and invalid notice. The learned Magistrates of the Bench who tried the case decided it in her favour upon the legal plea raised by Mt. Hans Mukhi Devi holding that the notice issued by the Medical Officer of Health purporting to be under S. 186, U. P. Municipalities Act (II [2] of 1916) was not a valid notice. It is against this finding of acquittal that the reference made by the learned District Magistrate of Jhansi is directed.



[4] From the order of reference recorded by the learned District Magistrate it would appear that in his opinion it was not within the power of the learned Magistrates of the Bench who tried the case to enter into the question of the legality or validity of the notice purporting to have been issued under S. 186 by the Medical Officer of Health. On that point, however, there is the Full Bench ruling of this Court in 1943 A. L. J. 103<sup>1</sup> in which it has been definitely held that :

"the criminal Court trying a case under S. 307, Municipalities Act is not debarred from going into the question of the legality of the notice under S. 186 on account of the bar laid down by S. 321 of the Act."

It follows, therefore, that the learned Magistrates who tried the case did have the power to consider the question of the validity or otherwise of the notice which was issued in this case to Mt. Hans Mukhi Devi and the view expressed by the learned District Magistrate of Jhansi to the contrary in his order of reference is not correct.

[5] The learned District Magistrate has, however, made the reference on another ground also and that is that the decision of the learned Magistrates of the Bench on the legal question of the validity or otherwise of the notice is wrong and must, therefore, be set aside and this Court should order a retrial. I am afraid that even on this point the learned District Magistrate does not stand on entirely safe ground. It appears to me *prima facie* that there was a grave legal defect in the notice inasmuch as it was issued by the Medical Officer of Health and the question immediately arises for consideration as to whether the Medical Officer of Health had any power to issue a notice under S. 186, U. P. Municipalities Act. It is admitted that there is an Executive Officer functioning in the Municipality of Jhansi and under S. 60 (1) (d), U. P. Municipalities Act the power to issue a notice under S. 186 can be exercised only by the Executive Officer and not otherwise. It has been suggested in the order of reference that the Medical Officer of Health exercised that power in the present case because it was delegated to him by the Executive Officer presumably under S. 62, Municipalities Act which runs as follows:

"With the sanction of the Chairman, an Executive Officer or Medical officer of Health may empower, by general or special order, any servant of the Board to exercise, under his control, any power conferred on him by or under this Act."

[6] To this, however, an objection was taken on behalf of Mt. Hans Mukhi Devi before the learned District Magistrate that the Medical Officer of Health was not a servant of the Board as contemplated by S. 62 to whom the power to

issue a notice under S. 186 of the Act could be legally delegated by the Executive Officer. "Servant of the Board", as defined by S. 2 (22), means any person in the pay and service of the Board. It is contended, and *prima facie* the contention seems to be perfectly sound, that the Medical Officer of Health is not a person in the pay and service of the Board and hence no power to issue a notice under S. 186 of the Municipalities Act could be delegated to him under S. 62 of the Act. I do not propose to decide this matter finally upon this reference. My object is only to show that it cannot be contended that the finding of acquittal recorded by the Magistrates of the Bench in the present case was on the face of it wholly wrong. If the finding was wrong, it could be set aside in appeal by this Court when the matter could be fully discussed. The Crown had a right to prefer an appeal, but it did not choose to exercise that right. The reference invokes the revisional powers of this Court merely on the ground that the District Magistrate is of the opinion that the finding of acquittal recorded by the Magistrates of the Bench is a wrong finding. It is not suggested that there has been any irregularity or illegality in the trial itself. If the Crown had filed an appeal from acquittal, as it could have done, this Court would have considered the question of the correctness or otherwise of the finding of acquittal and could have set aside that finding and could have also recorded a finding of conviction instead. I do not see any sufficient reason, in these circumstances, for ordering a retrial. It may also be pointed out in this connection that the notice purporting to be under S. 186, U. P. Municipalities Act was issued in this case by the Medical Officer of Health as long ago as 17-6-1944. Having regard to the long period which has elapsed since then, it would have been inadvisable, in my opinion, to order a retrial even upon that ground alone. The result, therefore, is that I reject this reference.

G.N.

*Reference rejected.*

**A. I. R. (34) 1947 Allahabad 143 [C. N. 68]**  
PATHAK AND BRAUND JJ.

*Nizam Uddin — Plaintiff — Appellant v. Ikramul Haq and others—Defendants—Respondents.*

L. P. A. No. 44 of 1944, Decided on 14-3-1946, from decision of Mathur J., in S. A. No. 636 of 1942, D/- 4th February 1944.

(a) Civil P. C. (1908), S. 11 — Execution — *Res judicata* — Applicability — Court passing order for benefit of decree-holder and to detriment of judgment-debtor — Order passed because certain point is not raised by judgment-debtor—Hearing of such point is barred by *res judicata* — Applicability of



principle of *res judicata* does not depend on question whether previous execution proceeding resulted in actual realisation of fruits of decree to any extent.

If the Court has passed an order which is for the benefit of the decree-holder and to the detriment of the judgment-debtor and which would not have been passed if a certain point has been raised by the judgment-debtor the hearing of such a point would be barred by the principle of *res judicata*. The application of this principle depends upon the existence of a decree or order and has no relation to the gathering of the fruits of such decree or order : 23 A. I. R. 1936 All. 21 (F.B.), *Foll.* [Para 6]

Where, therefore, orders are passed by the executing Court for the substitution of the legal representatives of the decree-holder and the judgment-debtor, the execution application, during the pendency of which those orders are passed, becomes fructuous and the objection regarding the executability of the decree cannot be taken in the subsequent execution proceedings, by the judgment-debtor. [Paras 3 and 6]

C. P. C.—

('44-Com.) S. 11, N. 23, Pt. 18.

(b) Civil P. C. (1908), O. 23, R. 3—Rule is imperative — Decree must show whether it is declaratory or directory and executable — Compromise decree — Direction to parties to execute and get registered deed of exchange—Provision is directory — Reference to remedy by way of specific performance does not make it declaratory.

Order 23, Rule 3 is imperative in its terms. Before making the compromise a rule of the Court, the Court should ascertain with precision the terms of the compromise and state in the operative portion of the decree the rights of the parties with such clearness as may leave no room for doubt with regard to the exact scope of those rights. Clarity is of the essence of a decree and upon a perusal thereof it should appear whether it is merely declaratory or is directory and executable : 6 A. I. R. 1919 P. C. 79, *Rel. on.* [Para 5]

A provision in a compromise decree directing the parties to execute and to get registered a deed of exchange is a directory provision and is capable of execution and the mere fact that a reference is made in the decree to the remedy by way of a suit for specific performance would not alter the nature of the decree and make it merely declaratory. [Para 7]

C. P. C.—

('44 Com.) O. 23, R. 3, N. 17, Pt. 3, Notes 18 and 27.

(c) Civil P. C. (1908), O. 23, R. 3 — Compromise decree — Duty of judgment-debtor — Judgment-debtor must see that proper decree is framed and that operative portion of decree expresses real intention of parties — No objection by judgment-debtor to frame of decree at proper time—Judgment-debtor acquiescing in decree as passed and taking benefit thereunder—Transaction will not be ripped up after it becomes old.

It is the duty of the judgment-debtor as much as that of the decree-holder to see that a proper decree is framed by the Court and that the operative portion of the decree expresses the real intention of the parties. Where the judgment-debtor does not raise an objection, at the proper time, to the frame of the decree and acquiesces in the decree being passed in the manner in which it is passed and takes benefit thereunder, the question of the framing of the decree being a matter relating to the procedure, the Court will not rip up the transaction which is an old one at the invitation of the judgment-debtor who has not only lain asleep upon his

rights but has also gained material benefits under the transaction. [Para 7]

C. P. C.—

('44-Com.) O. 23, R. 3, N. 18.

*Krishna Shankar* — for Appellant.

*Mukhtar Ahmad* — for Respondents.

Cases referred:—

1. ('35) 1935 A. L. J. 1189 : 23 A. I. R. 1936 All. 21 : 58 All. 313 : 160 I. C. 394 (F.B.), *Genda Lal v. Hazari Lal.*

2. ('19) 17 A. L. J. 1117 : 6 A. I. R. 1919 P. C. 79 : 47 Cal. 485 : 46 I. A. 240 : 53 I. C. 534 (P.C.), *Hemanta Kumari Debi v. Midnapur Zemindari Co. Ltd.*

**Pathak J.**—This is an appeal under Cl. 10 of the Letters Patent against the judgment of a learned Single Judge of this Court, whereby the execution application filed by the appellant in the Court of the Munsif Haveli, Azamgarh, was dismissed. The facts giving rise to this appeal are very short and may be stated as follows.

[2] The ancestor of the decree-holder, who is the appellant before us, obtained a decree on the basis of a compromise in Suit No. 156 of 1927 against the predecessor in title of the judgment-debtors, the respondents in this appeal. That suit was for a perpetual injunction restraining the defendants from interfering with the plaintiff's possession over a certain zemindari property and, in the alternative, for possession over the same. In the course of the trial in that suit, the parties arrived at a compromise, which they filed in Court, with the prayer that a decree be passed in terms thereof. As a result of the compromise, defendant 1 in the suit agreed to transfer certain property to the plaintiff by way of an exchange for the property which defendant 1 was allowed to retain in his possession. Under the compromise the parties were to execute and get registered a deed of exchange. The Court dealing with the suit passed an order directing a decree to be prepared in terms of the compromise. The result was that the terms of the compromise were incorporated in the decree. Condition No. 5 of the compromise is relevant and may be set out as follows:

"The plaintiff and defendant 1 will execute a decree of exchange and get it registered within a month. In case any of the parties fails to do so, it will be open to the other party to file an application for compulsory registration of the deed of compromise or the deed of exchange; or a suit for specific performance of the contract to execute and complete a deed of exchange with the terms mentioned above may be filed. No party will have any objection thereto."

In the execution application, the decree-holder prayed, *inter alia*, for the execution and completion of the deed of exchange in accordance with the compromise decree.

[3] The application was opposed by the judgment-debtor on the ground that the decree was not capable of execution. The decree-holder's



reply to this objection was that in the first place, by reason of the previous proceedings taken by the decree-holder for the execution of the decree it was not open to the judgment-debtor to raise the question whether the decree was capable of execution or not and in the second place on a true interpretation of the decree, it was executable under the provisions of O. 21, R. 34, Civil P. C. The learned Munsif who dealt with the execution application dismissed the objection filed by the judgment-debtor upon the short ground that the contention raised by the judgment-debtor, namely, that the compromise deed could be enforced only by means of a suit, was not correct. In appeal, the learned Civil Judge discussed the questions involved in the objections filed by the judgment-debtor at considerable length. He referred to the previous proceedings taken by the decree-holder, particularly to the third application for execution made by the decree-holder on 27th April 1937. He noted that upon the death of the judgment-debtor during the pendency of this execution application, his heirs were brought upon the record on 4th September 1937, and the original decree-holder also having died in the meantime his legal representatives were also substituted in his place. This execution application was ultimately dismissed on 23rd December 1937. Upon the question of *res judicata*, the learned Civil Judge came to the conclusion that in view of the fact that orders were passed by the executing Court for the substitution of the legal representatives of the decree-holder and the judgment-debtor, the execution application, during the pendency of which those orders were passed, became fructuous and relying upon the Full Bench decision in 1935 A.L.J. 1189,<sup>1</sup> he held that the objection regarding the executability of the decree could not be taken by the judgment-debtor. With regard to the question whether the compromise could be enforced only by means of a separate suit and the decree passed on the basis thereof was not executable, the learned Civil Judge held adversely to the decree-holder. In the view that the learned Civil Judge took on the question of *res judicata*, he affirmed the decree passed by the learned Munsif. Against this decree, an appeal was preferred to this Court by the judgment-debtor, which came on for hearing before the learned Single Judge who reversed the decrees passed by the Courts below.

[4] Upon the point relating to the question of *res judicata*, the learned Single Judge took the view that until and unless the relief of partial satisfaction was granted to a decree-holder in the course of the execution proceedings, the principle of *res judicata* could not apply. The learned Judge was further of the view that the

mere fact that an order adverse to the judgment-debtor was passed, which would not have been passed if the point as regards the executability of the decree had been raised before the Court passing that order, was not sufficient to attract the applicability of the principle of *res judicata*. With regard to the point whether the decree was capable of execution or not, the learned Single Judge held that

"the compromise, as it stood, was incapable of being incorporated in the decree even if the Court so desired and that it was not possible for any execution Court to enforce a specific performance or to have a document compulsorily registered unless the decree was passed in a suit for specific performance."

[5] Learned counsel for the appellant has challenged the view taken by the learned Single Judge on both the points. In logical sequence, the question of *res judicata* should be dealt with first. In the view that we are inclined to take, that question will be decisive of the present appeal. But for the moment we pass it by as certain general observations occur to us which we feel bound to make. This case illustrates how failure on the part of the civil Courts to observe the rules of procedure in framing decrees results in unnecessary litigation and waste of money. We note with deep concern that in a number of cases which have come up before us, we have had occasion to observe that no attention was paid to the relevant provisions of the Code of Civil Procedure at the time of passing decrees. We have to remark that the present litigation from the Court of the Munsif to this Court up to the stage of the Letters Patent appeal has been occasioned by the slipshod manner in which the decree under execution was prepared by the Court which passed it. If at the time when the decree was passed, the Court had complied with the provisions of O. 23, R. 3, Civil P. C., all the expense and trouble involved in this litigation would have been saved to the parties.

That rule is imperative in its terms. It says: |

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

Twenty seven years ago, in 17 A. L. J. 1117<sup>2</sup> this rule came in for consideration before their Lordships of the Privy Council. After quoting the rule, their Lordships proceeded:

"The terms of this section need careful scrutiny. In the first place, it is plain that the agreement or compromise, in whole and not in part, is to be recorded, and the decree is then to confine its operation to so much of the subject matter of the suit as is dealt with by the agreement. Their Lordships are not aware of the exact system by which documents are recorded in the Courts in India, but a perfectly proper and effectual method of



carrying out the terms of this section would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree, but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation, the decree taken as a whole would include the agreement."

We may respectfully add that before making the compromise a rule of the Court, the Court should ascertain with precision the terms of the compromise and state in the operative portion of the decree the rights of the parties with such clearness as may leave no room for doubt with regard to the exact scope of those rights. Clarity is of the essence of a decree and upon a perusal thereof it should appear whether it is merely declaratory or is directory and executable.

[6] To return to the question of *res judicata*, the opposed views are, on the one hand, that the principle of *res judicata* applies to execution proceedings only in cases where some money has been realised or some other kind of satisfaction has been made in the course of those proceedings; on the other hand, that if the Court has passed an order which is for the benefit of the decree-holder and to the detriment of the judgment-debtor and which would not have been passed if certain point had been raised by the judgment-debtor the hearing of such a point would be barred by the principle of *res judicata*. In our judgment, the application of this principle depends upon the existence of a decree or order and has no relation to the gathering of the fruits of such a decree or order. Reference was made by the learned Single Judge as well as by the lower appellate Court to the Full Bench case in 1935 A. L. J. 1189.<sup>1</sup> At page 1199 Sir Shah Sulaiman observed :

"If however some further step had been taken and the judgment-debtor had remained silent and such step had amounted to the application for execution fructifying so as to become analogous to a suit being decreed, then certainly it would have been too late for the judgment-debtor to raise an objection that the application itself was barred by time. And the bar would have continued even if that application were dismissed and objection were raised in a subsequent execution proceeding that the previous application was barred by time."

In the judgment of Sir Shah Sulaiman, Bennet, J. concurred. Niamatullah, J. however, delivered a separate judgment and at page 1205 of the report, there occurs in his judgment the following passage :

"The judgment-debtor is not barred by the principle of *res judicata*, unless . . . where the judgment-debtor might and ought to have taken the plea of limitation, but failed to do so, and the final result of the application was to grant the relief of partial satisfaction of the decree to the decree-holder."

If the observation made by Niamatullah J. is open to the interpretation that the realisation of

money or partial satisfaction of the decree is a necessary condition precedent to the application of the principle of *res judicata*, we, with great respect, are unable to follow this view, as in our opinion, it is opposed to the view taken by the majority in the Full Bench case. For this reason, we do not find ourselves in agreement with the judgment of the learned Single Judge upon this point and we are compelled to uphold the view taken by the lower appellate Court.

[7] We are glad to find that we can rest our decision upon the other ground also. It is noteworthy that the decree under execution was passed in the year 1928. It was the duty of the judgment-debtor as much as that of the decree-holder to see that a proper decree was framed by the Court and that the operative portion of the decree expressed the real intention of the parties. The judgment-debtor never raised an objection, at the proper time, to the frame of the decree. He acquiesced in the decree being passed in the manner in which it was passed and he took benefit thereunder. The question of the framing of the decree is a matter relating to procedure. In these circumstances, therefore, we cannot rip up the transaction which is 18 years old at the invitation of a party who has not only lain asleep upon his rights, assuming there were any, but has also gained material benefits under the transaction. We shall not, therefore, linger over the question whether the decree was framed by the Court, which passed it, in strict compliance with the provisions of O. 23, R. 3, Civil P. C. We shall proceed upon the footing that cl. 5 of the compromise was incorporated in the operative portion of the decree in accordance with the terms of that rule. All that we are concerned with, therefore, is to construe the decree as we find it. The first portion of cl. 5, as mentioned above, directs the parties to execute and to get registered a deed of exchange. This, in our judgment, is a directory provision in the decree and is capable of execution in the executing Court. The contention of the judgment-debtor, however, is that a reference to the remedy by way of a suit for specific performance makes the decree merely declaratory. In our judgment, if the decree is executable by reason of the first portion of cl. 5, the mere fact that a reference is made to the remedy by way of specific performance, in the latter portion would not alter the nature of the decree and would not deprive the earlier portion thereof of its legal effect. The latter portion which might have been introduced on account of misconception of law would be repugnant to the earlier portion and would be devoid of any legal consequence, so far as the question of the nature of the decree is concerned. In our judg-



ment, the decree is capable of execution and, upon this point, we do not share the view taken by the learned Single Judge or by the lower appellate Court. We are glad to find that the view that we have taken upon both the points is in accord with the justice of the case.

[8] In the result, we set aside the judgment of the learned Single Judge of this Court and restore the decree passed by the lower appellate Court. We direct that the judgment-debtor will pay the costs of the decree-holder incurred in the Courts below as well as in the second appeal which was disposed of by the learned single Judge and also in this appeal.

V.R.

*Appeal allowed.***A. I. R. (34) 1947 Allahabad 147 [C. N. 69]**

ALLSOP AND MATHUR JJ.

*Radha Mohan and others — Plaintiffs-Appellants v. Mrs. Eliza Jane Hilt and others — Defendants-Respondents.*

First Appeal No. 75 of 1946, De'd on 9-5-1946, from decision of Civil Judge, Allahabad, D/- 17-11-1945.

(a) Civil P. C. (1908), S. 11—Res judicata—After death of mortgagor his wife and daughter filing suit for redemption — Suit decreed ex parte — Subsequent suit on mortgage for sale against plaintiffs in first suit — Held persons interested in estate of mortgagor being parties to both suits, second suit was barred.

No doubt a second suit is not barred by the rule of res judicata when the persons concerned have litigated in the two proceedings in different capacities or under different titles. But each case must be examined on its particular facts. [Para 2]

As a general rule, a previous decision will not operate as res judicata in a subsequent suit if there is some interest in the subsequent suit which was not represented at all in the previous suit. [Para 3]

H executed a mortgage in favour of defendant's father. After the death of H his widow and daughter and six others brought a suit for redemption of the mortgage on the basis of the claim that they were entitled at law to the estate of the deceased H. The mortgagee not having appeared on the date of hearing, accounts were taken and an ex parte decree for redemption was passed on the footing that a certain amount was due from the plaintiffs. Defendant (son of the mortgagee) having failed to get the decree set aside and having also failed in his objections in execution proceedings, eventually filed a suit for recovery of the amount due on the mortgage by sale of the mortgaged property. His excuse for the suit was that the wife and daughter of H having applied for the probate or letters of administration to the will of H his suit against them was in their capacity of executrices or administrators while in the first suit they claimed as heirs at law of H. It was not in dispute that the wife and daughter of H were the sole legatees under the will:

Held, that everybody who could possibly be interested in the estate of H was a party to the first suit and the same persons were also parties to the second suit. Hence the second suit was barred by the rule of res judicata. [Para 2]

Held further, that as the plaintiffs in the previous suit alleged that they represented the estate of H and

that they were the owners of the equity of redemption and as a decree for redemption was passed in their favour it was also res judicata between the parties that the persons entitled to redeem the mortgage had already redeemed it. [Para 3]

Civil P. C.—('44-Com.) S. 11, Note 70.

(b) Civil P. C. (1908), S. 11 — Heard and decided — Date fixed for hearing — Defendant absent — Suit decreed ex parte is heard and decided.

Where a date is fixed for the decision of the suit in the case which meant that the parties were given an opportunity to be heard if they so wished, but the defendant does not appear on that date and the suit is decided ex parte against him, it cannot be said that the suit was not "heard and decided" for the purposes of applying the rule of res judicata. [Para 8]

Civil P.C.—('44-Com.) S. 11, N. 19.

(c) Civil P. C. (1908), S. 35-A — Plaintiff honestly advised that proposition of law on basis of which suit is filed is correct — Suit however found to be not maintainable — Suit is not frivolous or vexatious.

If a plaintiff has been quite honestly advised that the proposition of law on the basis of which he brings his suit is a correct proposition, but the Court afterwards decides that his suit is not tenable, it cannot be said that the suit was a vexatious or frivolous. In such a case the mere fact that some clerks of the plaintiff seemed to have been guilty of carelessness or dishonesty in not bringing certain matters to the plaintiff's notice would not be a ground for allowing special costs against the plaintiffs. [Para 9]

Civil P. C.—('44-Com.) S. 35-A, N. 2.

P. C. Chaturvedi —for Appellants.

Gopalji Mehrotra —for Respondents.

**Allsop J.**—This is a first appeal which has been listed with an application under Chap. V, R. 14-A of the rules of the Court. The application was that the appeal should be decided on a preliminary point without the printing of the records. This statement was perhaps not quite accurate, but the fact remains that the appeal has been listed before us and the arguments do not involve inspection of any documents on the record. We, therefore, proceed to decide it without putting the parties to the expense of printing or translation.

[2] We may now mention the facts. One E. A. Hilt executed a mortgage in favour of Lala Debi Prasad to secure a debt of Rs. 5,000. The property mortgaged was a house in Lukerganj, Allahabad, and the deed was executed on 1-6-1923. It appears that Hilt paid up part of the debt and that he acknowledged that a sum of Rs. 2,000 was still due in 1929. He died on 12-4-1939. Thereafter his widow, Eliza Jane Hilt, his daughter, Ivy Hilt, and six other persons instituted a suit for redemption of the mortgage on the basis of a claim that they were entitled at law to the estate of the deceased. The suit proceeded ex parte and a decree was passed in favour of the plaintiffs on the finding that a sum of Rs. 3,500 was due to (from?) them after the accounts had been taken. The defendant, who



was the son of Lala Debi Prasad made every effort to get the ex parte decree set aside, but he failed to do so. He also took objections in the Court executing the decree, but those objections were equally unsuccessful. He then instituted the suit which has given rise to this appeal for the recovery of the amount due under the mortgage by sale of the mortgaged property. His excuse for instituting this new suit is that Eliza Jane Hilt and her daughter, Ivy Hilt, applied for probate of a will said to have been executed by the husband of the former, or applied for letters of administration with a copy of the will attached. The learned Judge of the Court below has held that the plaintiff's claim was barred by the rule of *res judicata*. It is argued in appeal that the previous decision was in favour of Eliza Jane Hilt, Ivy Hilt and the other plaintiffs in that suit on the basis of their being heirs at law of the testator whereas the present suit is filed against Eliza Jane Hilt and Ivy Hilt in their capacity of the executrices or administrators under the probate or letters of administration issued to them and that the previous decision cannot be *res judicata* because these two women litigated in the two suits in different capacities namely in the first suit in their personal capacity and in the later suit as executrices or administrators representing the estate of the testator. This point has been urged before us at great length and with great vehemence by learned counsel on behalf of the appellant. He has quoted much authority for the proposition that a decision does not operate as *res judicata* when the person concerned has litigated in the two proceedings in 'different capacities or under a different title. We have no doubt that that is a correct proposition of law, but each case must be examined on its particular facts. In the case before us everybody who could possibly be interested in the estate of Hilt was a party to the first suit and the same persons are parties to the second suit. This is not a case where Eliza Jane Hilt and Ivy Hilt in their capacity as executrices or administrators are representing the interest of persons who were not represented in the previous suit. It is admitted that these two women are under the will the sole legatees. In their capacity as executrices or administrators they represent only their own interest as legatees.

[3] We think as a general rule that a previous decision will not operate as *res judicata* in a subsequent suit if there is some interest in the subsequent suit which was not represented at all in the previous suit. If the previous suit was instituted, for instance, by some person in his personal capacity and that person figured in a later suit in his capacity as a trustee, the deci-

sion in the first suit would not ordinarily bind the trust in the later suit, but if all the beneficiaries interested in the trust had also been parties to the first suit, we do not think that the Court should allow the question at issue to be agitated again in the second suit. In our judgment, therefore, in the case before us the learned Judge was right in holding that the previous decision was *res judicata* and the plaintiff could not succeed in the second suit because the mortgage in his favour has already been redeemed. We may add that the plaintiffs in the previous suit were alleging that they represented the estate of Hilt and that they were the owners of the equity of redemption. As a decree was passed in their favour, it is also *res judicata* between the plaintiff in the present suit and the defendants that the persons entitled to redeem the mortgage had already redeemed it.

[4] Learned counsel for the appellant also gave other grounds for urging that the previous decision was not binding upon his client. He said that the previous decision was based upon a fraud because the plaintiffs in the previous suit purposely concealed the existence of the will, the reason being that the testator had mentioned in the will that his house property was charged with debt and the statement would be in the nature of an admission. The reply is that no issue of fraud was raised in the Court below and we do not think that these would be the proper proceedings in which to raise it. The plaintiff could have got the previous decree set aside by instituting a suit on the basis of an allegation of fraud. We cannot infer that the plaintiffs in the previous suit were guilty of any dishonest deception because at that time they did not choose to rely upon the will.

[5] Another point is that the previous decision is void because the plaintiffs were debarred from making their claim under the provisions of ss. 212 and 213, Succession Act. The provisions of S. 213 did not apply to the previous suit because the plaintiffs were not relying upon a will. The provisions of S. 211 would apply if the plaintiffs were Anglo Indians and not Indian Christians. That is a question which again has never been put in issue and we do not think that the previous decree could be described as a valid [void ?] decree because possibly the Court, if the matter had been brought to its notice, might have refused to pass a decree unless probate or letters of administration were produced. The decision may or may not have been based on a misconception but that would not make it void when the present plaintiff did not raise the issue in the previous suit.

[6] Another point was that some of the plaintiffs in the present suit, that is, the sons of Radha



Mohan who was the son of Debi Prasad, were not bound by the previous decision because they were not parties to it and that they had acquired an interest in the mortgage on the death of Lala Debi Prasad. As their case was that there had been a partition in the family during the life time of Lala Debi Prasad and as the mortgagees' rights were not ancestral property, it is not clear to us how they can have any claim to appear as plaintiffs at all. Learned counsel has also suggested that the defendants had not proved by positive evidence that the parties in the previous litigation were identical with the parties in the suit which has given rise to this appeal. This point was not raised in the trial Court nor in the grounds of appeal before us and it is quite obvious that the defendants could not be called to produce evidence upon a point which was never put in issue between the parties. Nobody has the temerity positively to assert that the parties were different.

[7] There is also an argument that some of the documents on which the learned Judge has relied are not properly admitted into evidence because the learned Judge has not put any exhibits upon them. This again is a point that was not raised in the grounds of appeal or in the trial Court.

[8] Finally we may say that he took a point that the learned Judge who decided the first suit passed a decree for money against the mortgagee without passing a preliminary decree under the provisions of O. 34, R. 7, Civil P. C. His argument is that it cannot be said that the previous suit was "heard and decided" because, there being no preliminary decree the question of accounting did not properly arise and there was no occasion to hear the parties on that particular point. We cannot accept this argument. A date was fixed for the decision of the suit in the previous case and that meant that the parties were given an opportunity to be heard if they wished to be heard. The defendant did not appear and the suit was decided *ex parte* against him. It cannot be said that the suit was not heard and decided for the purposes of applying the rule of *res judicata*.

[9] In our judgment, there is no force in this appeal as far as the merits of the case arise. We think, however, that the appellant has one definite grievance. The learned Judge of the Court below not only allowed separate costs for the two sets of defendants, that is, defendants 1 and 2, on one side, and the other defendants 3 to 8 on the other side, but he also allowed special costs under Section 35A, Civil P. C., to each of these parties. We cannot say that he was not justified in allowing separate costs to the two sets of parties because their interests were indeed separate

and the plaintiff appellant chose to implead them in the suit. When the suit failed, they were entitled to get the costs which they had incurred. We feel, however, that the learned Judge was quite unjustified in allowing costs under S. 35A, Civil P. C. It cannot be said that the suit was vexatious or frivolous. The plaintiff may have been quite honestly advised that the proposition of law on which he has relied in this Court was a correct proposition. It cannot be said that the point taken by the appellant is so absolutely unarguable that any suit filed on the basis of the law as suggested by the appellant would be frivolous or vexatious. The learned Judge was influenced by the fact that some clerks in his office seemed to have been guilty of carelessness or dishonesty in not bringing certain matters to his notice and he jumped to the conclusion that the plaintiff was responsible for the action of the clerks. That would not be a ground for allowing special costs.

[10] We, therefore, dismiss the appeal except in so far as we modify the order for costs in the Court below. The parties will get their proportionate costs in appeal and the order for costs in the lower Court will stand except that the respondents will not be allowed the special costs under S. 35A, Civil P. C.

N.S.

*Order accordingly.*

### A. I. R. (34) 1947 Allahabad 149 [C. N. 70]

MULLA J.

*Mohan Lal — Applicant v. Emperor.*

Criminal Revn. No. 1363 of 1944, De'd on 3-9-1945, from order of Additional Sessions Judge, Saharanpur, D/- 4-9-1944.

(a) Hoarding and Profiteering Prevention Ordinance (35 [XXXV] of 1943), as amended by Ordinance (12 [XII] of 1944), S. 6 — Charge of offering imported goods at unreasonable consideration — Onus of proof — Prosecution must prove landed cost of article at or about the time transaction took place.

The normal rule which applies to every criminal case must be applied also to a prosecution for an offence under S. 6 of the Ordinance, namely that the onus of establishing all the ingredients of the offence lies entirely upon the prosecution. [Para 7]

Where the charge against the applicant is that he offered certain cloth for sale at a price which constituted unreasonable consideration within the meaning of S. 6, inasmuch as it included more than 20 per cent. of profit over and above the landed cost of the article as permitted by S. 6, it is the duty of the prosecution to prove the landed cost of the article sold or offered to be sold, because unless that point is established it cannot be found against the accused person that the price obtained or demanded by him was in contravention of the provisions of S. 6. The landed cost of the article as contemplated by S. 6 of the Ordinance must be deemed to be the landed cost at or about the time when the transaction which is the subject of the charge against the accused person took place. [Para 7]



The proprietor of a firm was charged for offering certain imported article at unreasonable consideration. The transaction which was the subject of the charge took place in 1944. The only evidence of the landed cost was the casual statement of the antiprofitteering inspector based not upon any evidence in the case but upon private information, and the invoice showing that the article in question was purchased at certain price in 1942;

*Held*, that there was no evidence which could enable the Court to arrive at any finding as to the landed cost of the article offered. [Para 9]

(b) Hoarding and Profiteering Prevention Ordinance (35 [XXXV] of 1943), as amended by Ordinance (12 [XII] of 1944), S. 14 — Sanction for prosecution — Order stating "Prosecution sanctioned" without mentioning offence — Record not showing whether authority had considered facts of the case — *Held* there was no valid sanction.

Where the order alleged to sanction prosecution under S. 6, stated "Prosecution sanctioned" without even mentioning any offence and record of the case did not show whether the officer authorised to sanction prosecution had applied his mind to the facts of the case and arrived at the result that an offence requiring sanction had been committed :

*Held* that there was no valid sanction under S. 14. [Para 11]

*C. B. Agarwala* — for Applicant.

*Deputy Government Advocate* — for the Crown.

**Order.**— This is an application in revision by one Mohan Lal who has been convicted under S. 6 of Ordinance 35 [XXXV] of 1943 as amended by Ordinance 12 [XII] of 1944. He has been sentenced to pay a fine of Rs. 500 and in default to undergo one month's rigorous imprisonment.

[2] The applicant is one of the proprietors of a firm styled Messrs. Puran Chand and Sons. This firm deals in cloth and has a retail shop in Mussoorie. On 29-3-1944, a lady customer went to the applicant's shop and wanted to purchase some Viyella Flannel. The attendant at the shop showed her the stuff and upon being asked what was the price he demanded Rs. 12 per yard. The lady customer thought that the control price of the article was only Rs. 5 per yard and she accordingly made a report on 1-4-1944, to the District Supply Officer, Mussoorie, in which she mentioned the facts stated above. Upon this report Mr. J. B. Saxena, an Anti-Profiteering Inspector, proceeded to the applicant's shop and found several bales of Viyella Flannel there to which labels were attached showing that the price per yard was Rs. 12/8. He demanded the invoice for the cloth which was supplied and which showed that the cloth had been purchased by the firm from another firm in Delhi in the year 1942 at Rs. 8/8 per yard. Upon these facts the applicant was prosecuted for an offence under S. 6, Hoarding and Profiteering Prevention Ordinance No. 35 [XXXV] of 1943. The said Section runs as follows:

"(1) Where no maximum has been fixed by notification under clause (c) of sub-s. (1) of S. 3, no dealer or producer shall sell or offer for sale or otherwise dispose of an article for a consideration which is unreasonable.

(2) For the purposes of this section a consideration is unreasonable if, whether it is exclusively in money or not:

(a) the purchaser is, as a condition of sale, required to purchase at the same time any other article:

(b) where the sale is by a dealer, the consideration exceeds the amount represented by the addition allowed by the normal trade practice in force on 31-8-1939, to—

(i) the landed cost of the article in the case of an article imported into British India, or, where the article is delivered to the consignee elsewhere than at a port, that cost increased by any charges incurred for freight and octroi or other duties before delivery, or

(ii) the price at which the producer sold the article in the case of an article which is not imported ;

(c) where the sale is by a producer, the consideration exceeds the amount represented by the addition allowed by the normal trade practice in force on 31-8-1939 to the cost of production :

Provided that, where the addition allowed by such normal trade practice exceeds or is alleged to exceed 20 per cent., the dealer or producer, as the case may be, shall report the fact to the Controller General who may either sanction such addition or, for reasons to be recorded in writing, order its variation; and, unless such report has been made and the price charged is within the limits approved by the Controller General under this proviso, the dealer or producer, as the case may be, shall be deemed to sell for a consideration which is unreasonable.

(3) The Controller General may make or cause to be made a certificate stating the landed cost of any imported article dealt in by a dealer, and shall, on request made by any dealer, grant or cause to be granted to that dealer a certificate stating the landed cost of any such imported article....."

[3] The prosecution examined three witnesses in support of the charge against the applicant. Witness 1 was the lady customer referred to above who only stated the fact that she had gone to the shop on 29-3-1944, and wanted to purchase Viyella Flannel and was told by the attendant at the shop that the price of the article was Rs. 12 per yard; whereas she thought that the control price was only about Rs. 5 per yard. This fact is not now in contest and hence no further reference is necessary to the evidence of the lady customer. The next witness for the prosecution was Mr. J. B. Saxena, the Anti-Profiteering Inspector. He proved the fact that upon a complaint made by the lady customer he proceeded to the applicant's shop and found a number of bales of Viyella Flannel there which had labels attached to them showing that the price per yard was Rs. 12-8-0. He further proved that upon his demand an invoice was produced by the attendant at the shop from which it appeared that the cloth had been purchased by the firm from another firm at Delhi in the year 1942 at Rs. 8-8-0 per yard. Lastly he stated that he had obtained the sanction of the



District Magistrate for the prosecution of the applicant for an offence under S. 6 of the Ordinance. Witness 3 only gave formal evidence to the effect that in his presence certain bales of cloth to which labels were attached showing the price to be Rs. 12-8-0 per yard were seized by Mr. J. B. Saxena in the circumstances stated above.

[4] The defence taken by the applicant was that he had instructed his servants not to sell the cloth in question until a price had been fixed by the Controller General and secondly, that he was not in any case responsible because he was then not present in Mussoorie at all.

[5] The applicant was tried summarily by a Magistrate of the first class at Mussoorie and was convicted and sentenced as mentioned above. The defences taken by him were rejected and I may say at once that there was no force in those pleas.

[6] Two points have been raised on behalf of the applicant in the course of the argument before me. The first point is that the prosecution in this case entirely failed to prove the landed cost of Viyella Flannel and hence it cannot be said that in charging Rs. 12-8-0 per yard for that stuff the applicant's firm demanded a price which can be said to be a consideration which is unreasonable within the meaning of S. 6 of the Ordinance, inasmuch as there is nothing to show that the price demanded by the applicant's firm included more than 20 per cent. of the profit over and above the landed cost as permitted by S. 6 of the Ordinance. It has been emphasized by learned counsel for the applicant that the landed cost which the prosecution must prove in every case in which a person is charged with an offence under S. 6 of the Ordinance must be the landed cost at or about the time when the offence is alleged to have been committed. The second point raised by learned counsel for the applicant is that there was no valid sanction for the applicant's prosecution in the present case. This point has been raised in view of S. 14 of the Ordinance which runs as follows :

"No prosecution for any offence punishable under this Ordinance shall be instituted except with the previous sanction of the Central or the Provincial Government, or of an Officer not below the rank of a District Magistrate empowered by the Central or the Provincial Government to grant such sanction."

[7] Upon a careful consideration of these points raised by learned counsel for the applicant and after having heard learned counsel for the Crown, I have arrived at the conclusion that both these contentions are sound and must prevail. With regard to the first point, it is enough to state that the normal rule which applies to every criminal case must be applied also to a prosecution for an offence under S. 6 of the Ordinance, namely, that the onus of establishing

all the ingredients of the offence lies entirely upon the prosecution. The charge against the applicant is that he offered certain cloth for sale at a price which constituted unreasonable consideration within the meaning of S. 6, inasmuch as it included more than 20 per cent. of profit over and above the landed cost of the article as permitted by S. 6. It is, therefore, necessary to ascertain what the landed cost of the article was before it can be held that in offering to sell the article at Rs. 12 per yard the applicant's firm demanded a price which included more than 20 per cent. of profit over and above the landed cost. It is clearly in my opinion the duty of the prosecution in every case under S. 6 of the Ordinance to prove the landed cost of the article sold or offered to be sold, because unless that point is established it cannot be found against the accused person that the price obtained or demanded by him was in contravention of the provisions of S. 6 of the Ordinance. I am further clear in my mind that the landed cost of the article as contemplated by S. 6 of the Ordinance must be deemed to be the landed cost at or about the time when the transaction which is the subject of the charge against the accused person took place.

[8] Now, in order to discharge the onus which lay upon the prosecution in the present case Mr. J. B. Saxena, the Anti-Profiteering Inspector, appears to have stated categorically in the course of his evidence that the landed cost of Viyella Flannel in the year 1944 was Rs. 6-12 a yard. The trial, as already stated, was summary and no notes of the evidence were kept by the learned trying Magistrate. It appears, however, from the judgment of the learned Magistrate that a statement to that effect was made by Mr. J. B. Saxena in the course of his cross-examination. It may be noted that even from what the learned Magistrate had stated in his judgment it is clear that no attempt was made by Mr. J. B. Saxena in the course of his examination-in-chief to prove the landed cost of the article. I find further that there is nothing in the judgment of the learned trying Magistrate to show that Mr. J. B. Saxena referred to any document upon which his knowledge relating to the landed cost of the Viyella Flannel was based. It was open to the prosecution to obtain a certificate from the Controller General as to the landed cost of the article, but no such step appears to have been taken.

[9] The prosecution relies only upon the solitary statement of Mr. J. B. Saxena made by him in the course of his cross-examination which has been referred to by the learned trying Magistrate in his judgment. It is not clear at all whether any further questions were put by



the cross-examining counsel to Mr. Saxena in order to ascertain his source of knowledge relating to the statement made by him. Ordinarily one would think that an Anti-Profiteering Inspector need not necessarily be aware of the landed cost of every article in the absence of any certificate given by the Controller General. He is not an exporter or importer of any article and his knowledge must be based upon some document or some order or notification of the Government or the Controller General. That material has not been placed before the Court in the present case. I am not, therefore, prepared to attach any weight to the evidence of Mr. J. B. Saxena as proof of the landed cost of the article. Indeed, Mr. Saxena's casual statement in the course of his cross-examination relating to landed cost appears to me to be based not upon any evidence in the case but upon some knowledge derived from some private source of information which he had but which was not disclosed. The only other attempt made by the prosecution to discharge the onus of proof which lay upon it was to refer to the invoice produced by the applicant's firm from which it appeared that this firm purchased the article in question from another firm at Delhi in the year 1942 at Rs. 8-8 per yard. It was contended on that basis that the landed cost of the article must have been less than Rs. 8-8, the price paid by the applicant's firm, but the point remains that what the prosecution has to prove in these cases is the landed cost at or about the time when the transaction which is the subject of charge against the accused persons takes place. There is absolutely no evidence in my opinion which can enable the Court in the present case to arrive at any finding as to the landed cost of the article offered for sale by the applicant's firm. Upon this ground alone the prosecution should in my opinion fail.

[10] I find, however, that the second point raised by the learned counsel for the applicant has also great force and drives me to the conclusion that the prosecution in this case was not validly initiated. The facts in this connection may briefly be stated. There is on the record of the case a slip of paper which is marked Ex. E. It contains a communication addressed by Mr. J. B. Saxena to the Town Rationing Officer in the following terms :

"The letter received from Mohan Lal amending his previous statement does not affect the merits of the case at all. Sale or no sale is the same when prices are marked and the cloth bears the selling price."

Underneath this communication I find another addressed presumably to the District Magistrate by one Mr. Khanna, the Price Control Officer, Mussoorie, which runs as follows:

"Please see my note of 15-4-44 and Mr. Johnston's

order of 17-4-44 giving time to Mr. Mohan Lal for interview. Orders are now solicited whether you would like to see Mr. Mohan Lal on your next visit to Mussoorie or whether orders would be passed by you finally now without seeing him."

[11] Now, on this slip of paper exhibiting E I further find an order recorded in the following terms : "Prosecution sanctioned. Mussoorie trial in S. D. M's Court." This order is signed by Mr. D. G. P. Anthony. I am informed that Mr. Anthony was at the time officiating for Mr. Johnston as Superintendent of Dehrandun. From what I have stated above it is perfectly clear that there is absolutely no reference at all in Ex. E to the facts of the case and the offence, if any, which the applicant was alleged to have committed. The two notes of 15th and 17-4-1944, referred to in the communication addressed by Mr. Khanna to the District Magistrate are not to be found on the record. From the context of the communication, it would appear that those notes did not refer to the facts of the case or the alleged charge against the applicant. Then we find the brief order recorded by Mr. D. G. P. Anthony which does not show at all whether he applied his mind to any set of facts put before him and whether upon doing so he came to the conclusion that the applicant had committed an offence under S. 6 of the Ordinance. The cryptic order recorded by Mr. Anthony makes no reference at all to any offence. In fact it is not even clear in this case whether Mr. Anthony was empowered by the Provincial Government to grant sanction for prosecution for any offence committed under the Ordinance. My attention was drawn by learned counsel for the Crown to a Government notification to the effect that all District Magistrates in the Province were authorised by the Provincial Government to sanction prosecutions under S. 14 of the Ordinance and it was contended that Mr. Anthony being at the time in the position of an Officiating Superintendent of Dehran Dun must be presumed to have the power contemplated by S. 14. I am not quite clear on this point, but one thing is quite clear to my mind and that is that the sanction for Prosecution given in the present case was not a valid sanction as required by the law. As I have already stated, the material on the record before me does not show at all whether Mr. Anthony ever applied his mind to any set of facts and having done so arrived at the result that any offence under S. 6 of the Ordinance had been committed by the applicant. His cryptic order does not even mention any offence. Such a sanction in my opinion is not a valid sanction and I must, therefore, hold that the prosecution in this case failed to remove the bar placed in its way by S. 14 of the Ordinance and upon that ground also it must fail.



[12] The result, therefore, is that I allow this application in revision and set aside the conviction and sentence of the applicant Mohan Lal. The fine, if paid by him, shall be refunded. The order of confiscation passed by the learned trying Magistrate is also set aside.

V.B.B.

*Conviction set aside.*

**A. I. R. (34) 1947 Allahabad 153 [C. N. 71]**

**BRAUND AND PATHAK JJ.**

*Kedar Nath — Applicant v. Commissioner of Income-tax, U. P. & C. P. & Berar, Lucknow — Respondent.*

Misc. Case No. 14 of 1945, Decided on 3-5-1946.

Income-tax Act (1922), S. 34 — Applicability — Conditions for — Discovery of under-assessment must be result of definite information of new facts and not the result of change of mind on closer study of facts.

Three conditions are to be satisfied before the Income Tax Officer takes action under S. 34. There must be definite information which has come into the possession of the Income-tax Officer; (2) there must be discovery of under-assessment etc., and (3) the discovery must have been the result of that definite information. The words "definite information" are placed in S. 34 to protect the subject against any assault by the Income-tax Officer based upon mere suspicion. A mere change of opinion based on the same facts and figures does not amount to 'discovery' within the meaning of this section. The discovery must be on some definite information. It is always necessary to examine how the Income-tax Officer acted before proceeding to issue a notice under S. 34. The mere fact that a discovery of under-assessment was made would not justify the Income-tax Officer in acting under S. 34. Suspicion or a closer study of the facts which were gone into by the Income-tax Officer at the time of the original assessment or even a fresh investigation by him or by his successor would not bring the case within the purview of the section. The 'information' must be definite and must be of new facts. If those facts were already in the possession of the Income-tax Officer, the language of the section would not be satisfied. Misc. No. 162 of 1943, *Foll.* [Paras 2 and 3]

*M. N. Agarwala — for Applicant.*

*Brijlal Gupta — for Respondent.*

**Pathak J.**—This is a reference under S. 66 (1), Income-tax Act made by the Income-Tax Appellate Tribunal for decision by this Court of the following question :

"Whether in the circumstances of the case the Income-tax Officer was entitled to reopen the assessment under S. 34 of the Act."

The assessee, in this case, is a practising Barrister, who was assessed for the assessment year 1940-41 by the then Income-tax Officer, Moradabad, on 28-1-1941. He was assessed in respect of income from profession, property, interest and dividends. In the course of the assessment proceedings, it transpired that the assessee had purchased and sold shares in companies and suffered losses in the course of those transactions. Such losses were not allowed as deductions as, in the opinion of the Income-tax Officer, the assessee

was not carrying on business in the sale and purchase of shares. The said Officer observed:

"Owing to war the assessee tried to dispose of his shares and purchase new ones. Purchasing and selling of shares is not his business."

It appears that the Officer who made the original assessment was transferred and was succeeded by another Officer. On 12-2-1942, a notice was issued to the assessee by this new Officer under S. 34, Income-tax Act and, in pursuance of that notice, supplementary proceedings for the assessment in respect of the year 1940-41 were taken with the result that the assessment was enhanced by the order, dated 13-8-1942. It is necessary to note what the Officer had to say with regard to the transactions of purchase and sale of shares. After referring to the above remarks made by his predecessor, this Officer proceeded to observe:

"as I could not find any notes in the miscellaneous file on the basis of which this remark was incorporated in the assessment order, I gave an opportunity to the assessee to clarify the situation but he did not explain anything. He did not even furnish a statement showing the purchases and sales made by him. I, therefore, proceed to assess the income from this source to the best of my judgment."

The result was that in addition to other matters, the Income-tax Officer made an assessment on the assessee in respect of profits said to have been earned by the assessee in what was found to be business in the purchase and sale of shares. In appeal, the Appellate Assistant Commissioner affirmed the supplementary assessment and on a further appeal to the Income-tax Appellate Tribunal this supplementary assessment was upheld. It is in these circumstances that the question mentioned above has been referred to us for decision.

[2] Shortly put, the question is whether the proceedings taken by the Income-tax Officer were justified by the provisions of S. 34. In other words, were the terms of S. 34 satisfied before the Income-tax Officer took action under that section? Section 34, so far as it is material, is as follows :

"If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits, or gains chargeable to income-tax have escaped assessment in any year, or have been under-assessed or have been assessed at too low a rate, or have been the subject of excessive relief under this Act, the Income-tax Officer may, in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years, and in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income, profits or gains...a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of S. 22 and may proceed to assess or re-assess such income, profits or gains..."



It is manifest from the language of this section that three conditions must be satisfied before an Income-tax Officer can take action under it: (1) there must be definite information which has come into the possession of the Income-tax Officer; (2) there must be discovery of under-assessment etc., and (3) the discovery must have been the result of that definite information. The true interpretation of this section came in for consideration on an earlier occasion before my learned brother sitting with Malik J. in the case of *Badar Shoe Store, Agra* (Miscellaneous No. 162 of 1943) decided on 8-2-1945. In that case, the requirements of S. 34 were considered at considerable length and it was pointed out that the words "definite information" are placed in S. 34, Income-tax Act, to protect the subject against any assault by the Income-tax officer based upon mere suspicion. It was further remarked:

"The 'definite information,' which is something more than mere gossip or rumour, must lead to the discovery, or 'belief' as we have described it above."

It was also pointed out that a mere change of opinion based on the same facts and figures does not amount to 'discovery' within the meaning of this section. In order to judge whether the requirements mentioned above of S. 34, which, in our opinion, are a condition precedent to the applicability of the section—are satisfied, it is always necessary to examine how the Income-tax Officer acted before proceeding to issue a notice under S. 34. It would have been helpful if it had been stated in the supplementary assessment order what was the definite information in consequence of which the discovery in question was made by the Income-tax Officer. From the supplementary assessment order and from the order passed by the Appellate Assistant Commissioner, we do not derive any assistance upon that point and from those orders it is impossible to say whether the condition precedent mentioned above was satisfied. From the order of the Income Tax Appellate Tribunal also, it does not appear what was the definite information which had come into the possession of the Income-tax Officer, nor does it appear that it was in consequence of any definite information that the discovery of under-assessment was made. The mere fact that a discovery of under-assessment was made would not justify the Income-tax Officer in acting under S. 34, and therefore, the present is a case where although it may be said that there was a discovery of under-assessment, it could not be said that it was in consequence of something definite of which the Income-tax Officer had been informed that the under-assessment was discovered.

[3] In our view, suspicion or a closer study of

the facts which were gone into by the Income-tax Officer at the time of the original assessment or even a fresh investigation by him or by his successor would not bring the case within the purview of the section. The 'information' must be definite and it appears from the words "which has come into his possession" that this information must be of new facts. If those facts were already in the possession of the Income-tax Officer, the language of the section would not be satisfied. The question of vital importance, in this case, is whether the discovery made by the Income-tax Officer was in consequence of such definite information as is contemplated by the section. As we have stated above, if discovery is the result of a further investigation or a closer study of the facts and circumstances of the case, such discovery would not be in consequence of 'definite information' within the meaning of the section. We have quoted above the orders of the Income-tax Officer and the Appellate Assistant Commissioner and we do not find any trace of any definite information having come into the possession of the Income-tax Officer resulting in the discovery of under-assessment. We have, therefore, no option but to hold that the terms of S. 34, were not fulfilled before action was taken by the Income-tax Officer under that section.

[4] It is worthy of note that, by the Amendment Act of 1939, the language of S. 34 has been made more stringent and it would be only in a limited number of cases where action would be permissible under S. 34. The intention of the Legislature in making the amendment was that the assessee should not be harassed by the reopening of the assessment and the assessment once made must be closed, but in special circumstances contemplated by the section, it should be open to the Income-tax Officer to reopen the assessment. We have no doubt that the Income-tax Officer was not justified in taking action under S. 34, and we answer the question referred to us in the negative.

[5] **Braund J.**—I only desire to add a few words. In my opinion it can never be supposed that S. 34 (1), Income Tax Act, was intended to give to an Income-Tax Officer, or to any successor-in-office of an Income-Tax Officer, a mere license to reinvestigate the facts on which a previous assessment has been based. Still less can it be supposed that it was intended to enable him to do any such thing on mere suspicion, however well founded that suspicion may prove to have been.

[6] The section has been very carefully worded: and in my opinion its object has been to avoid any possible confusion between that which is discovered and the "definite information" of which the discovery must be the consequence.



As I see it, the discovery itself is one thing, while the 'definite information' in consequence of which it is made is an entirely different thing. The ultimate "discovery" is, of course, in any case that "income, profits or gains chargeable to tax have escaped assessment". But the 'discovery' is itself a mere conclusion of law and must be based on the discovery of facts. And both these discoveries are required by the section to have been made in consequence of definite information which has come into the possession of the Income-Tax Officer.

[7] In the present case, in my opinion, the whole trouble has arisen from a failure to distinguish between what was discovered and the definite information in consequence of which the discovery was made. Let us assume that everything that the Income-Tax Officer in his assessment, and the Appellate Tribunal in their judgment, refer to was discovered by the later Income-tax Officer for the first time, although there is in my opinion no evidence to support that conclusion. It still remains a fact that there is not an iota of material in this record to show that the Income-Tax Officer reopened the matter in consequence of any information he had received definite or otherwise prior to his re-investigation. The whole history of this matter, as disclosed in the record, is consistent—and perhaps more consistent—with the construction that the second Income-Tax Officer was dissatisfied with the view taken by the first and therefore, decided to reopen the matter. Even if, in course of that reinvestigation, he then discovered what he says he did discover, that does not in my opinion satisfy the section, which requires that the discovery should have been in consequence of definite information received. The long and short of it is that in this case no "definite information" is shown to have been received in consequence of which the Income-Tax Officer made his renewed investigation and ultimately assessed the assessee afresh.

[8] **By the Court.**—We answer the question referred to us in the negative and hold that in the circumstances of the case the Income-Tax Officer was not entitled to re-open the assessment under S. 34, Income-tax Act. By consent we make no order as to the costs of this reference. A copy of our order will be sent by the Registrar to the Income-Tax Appellate Tribunal under the seal of the Court.

R.G.D.

*Answer in negative.***A. I. R. (34) 1947 Allahabad 155 [C. N. 72]**

MALIK AND PATHAK JJ.

*Ganeshilal and sons, Agra—Applicants v. Commr. of Income-Tax — U. P. & C. P. & Berar, Lucknow—Opposite Party.*

Miscellaneous Case No. 55 of 1944, Decided on 1st May 1946.

Income-tax Act (1922), S. 4 (2) (as it stood before the amendment of 1939) — Liability to tax in respect of income arising without British India rests on fact of receipt of income in British India and not on fact of accrual of such income to assessee in foreign country—For purposes of determining question whether entire income chargeable under Income-tax Act was available at time of remittance to British India, expenditure not admissible under S. 10 (2) must also be taken into consideration.

The assessee a Hindu undivided family carried on business in Agra. It had also got a branch business at Cairo in Egypt. The year of account at Cairo ended 20th October 1937 and the year of account at Agra ended 20th March 1938. During the year of account of the assessee a sum of Rs. 50,258 was brought from Cairo into British India. At the branch business at Cairo the assessee made a profit of Rs. 1,50,243 during the four years ending 20th October 1937 and during this period a sum of Rs. 1,59,558 was expended at Cairo. Out of this sum Rs. 1,24,685 was admissible expenditure under S. 10 (2). The question was whether in assessing the income, profits and gains of the Cairo branch for the four years in question the entire sum of Rs. 1,59,558—the total expenditure—should be deducted or merely a sum of Rs. 1,24,685 expenditure admissible under S. 10 (2) :

*Held* that the question as to what was the income, profits or gains made by the Cairo branch which attracted income-tax could be answered by stating that only the sum of Rs. 1,24,685 could be deducted from the trade receipts. But the liability to tax in respect of income arising without British India rests upon the fact that the income is brought or received in India and not upon the fact that it accrues to the assessee in a foreign country. It is always a relevant question as to whether any and what part of the foreign income has been expended by the assessee before the remittance in question is made to British India. It is not necessary that an assessee should spend his income only after it has been ascertained for income-tax purposes. He is at liberty to spend it either after ascertaining it in accordance with the Income-tax Act or before it is ascertained in that manner. In a case where the trading receipts exceed the total amount of expenditure and there is consequently a balance in the hands of the assessee the money spent prior to the determination of the income should be treated as having been spent out of the income. Thus for the purposes of determining the question whether the entire income chargeable under the Income-tax Act was available at the time of the remittance to British India, expenditure, although not admissible under S. 10 (2), must be taken into consideration. The excess of profits and gains as determined under the Income-tax Act, over the inadmissible expenditure would represent the amount available for transmission to British India and it will be this excess which should be treated as a remittance of profits. [Paras 5 and 6]

*M. N. Agarwala*—for Applicants.

*Brijlal Gupta*—for Opposite Party.

**Pathak J.**—This is a reference under S. 66 (1), Income-tax Act, made by the Income-tax Appel.



late Tribunal in relation to an assessment made under S. 23 (2) read with S. 34 of that Act for the assessment year 1938-39. The question of law which has been referred for our decision is as follows :

"Whether, in the circumstances of this case, in determining the profits and gains accruing or arising to the assessee from the Cairo business under S. 4 (2), Income-tax Act, 1922, (prior to its amendment in 1939) for assessment on the remittance basis, such expenses as are not admissible under S. 10 (2) of the Act are deductible from the gross profits in addition to those that are admissible under this section ?"

[2] The assessee is a Hindu undivided family carrying on business in Agra. It has also got a branch business at Cairo in Egypt. It may be noted that the year of account for the business at Cairo ended October 1937 and that for the business at Agra Head Office ended 20th March 1938. The material facts appearing from the statement of the case are these:

[3] During the year of account of the assessee a sum of Rs. 50,258 was brought from Cairo into British India. At the branch business at Cairo, the assessee made a profit of Rs. 1,50,243 during the four years ending 20th October 1938 (1937?) and during this period a sum of Rs. 1,59,558 was expended at Cairo. Out of this sum, Rs. 1,24,685 was admissible expenditure in accordance with the provisions of S. 10 (2), Income-tax Act.

[4] The Income-tax Officer held that the entire sum of Rs. 50,258 was a remittance of profit. In appeal, the Appellate Assistant Commissioner took the view that only Rs. 43,151 represented profits earned at the Cairo branch during the four years ending 20th October 1938 (1937?) and consequently the sum of Rs. 43,151 only out of Rs. 50,258 should be treated as a remittance of profits. The substantial point of complaint before the Income-tax Appellate Tribunal was that in assessing the income, profits and gains of the Cairo branch for the four years in question, the entire sum of Rs. 1,59,558 the total expenditure—should have been deducted and not merely a sum of Rs. 1,24,685—expenditure admissible under S. 10 (2), Income-tax Act. The Tribunal reached the conclusion that in the computation of the net income for income-tax purposes only those expenses could be taken into consideration which were admissible under the Income-tax Act, and as the expenditure was made before the profits were determined, it was open to argument that inadmissible expenses might have been met out of capital. Dissatisfied with the decision of the Tribunal, the assessee made an application for reference of the question of law arising out of the order of the Tribunal to this Court: Hence this reference.

[5] In order to appreciate the controversy

between the parties, it is necessary to bear in mind the terms of S. 4, Income-tax Act, as it stood before the amendment of 1939. That section, so far as it is material for the purposes of this reference, is as follows :

"4. (1) Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in S. 6, from whatever source derived, accruing or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India.

(2) Income, profits and gains accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be income, profits and gains of the year in which they are so received or brought notwithstanding the fact that they did not so accrue or arise in that year. . . ."

It is clear from the language of sub-s. (2) that it is a "deeming" provision and it means that income, profits and gains which have accrued or arisen without British India to a person resident in British India shall be treated as having accrued or arisen in British India, provided they are received in or brought into British India. There is no question that the sum of Rs. 50,258 was brought into British India. The only question, therefore, is whether this sum represents income, profits and gains which accrued or arose to the assessee at Cairo. It is manifest from the language used in sub-s. (1) that the Income-tax Act shall apply to "income, profits or gains, as described or comprised in S. 6." In other words, only such income, profits and gains attract income-tax as have been computed in the manner provided in Ss. 7 to 12. As we are concerned with income under the head "business", profits and gains have to be computed in accordance with S. 10 and it is obvious that only those allowances which are mentioned in sub-s. (2) of S. 10 can be deducted in the computation of the profits and gains chargeable to income-tax. Thus the question as to what was the income, profits or gains made by the Cairo branch which attracted income-tax can be answered by stating that only the sum of Rs. 1,24,685 could be deducted from the trade receipts.

[6] The solution of the problem as to whether the sum of Rs. 50,258 brought into British India was a remittance of profit or not would depend, in this case upon the answer to two questions; firstly what was the amount of profits and gains which accrued or arose to the assessee from the Cairo business; secondly, whether the entire amount of such profits and gains was available to the assessee for the purpose of being remitted to British India? It is open to an assessee who earns income in a foreign country to spend the same in any manner he likes and not to remit it to British India. The liability to



tax in respect of such income, however, rests upon the fact that the income is brought or received in British India and not upon the fact that it accrues to the assessee in a foreign country. The assessee being at liberty to spend the whole or part of his foreign income outside British India, it is always a relevant question whether any and what part of the foreign income has been expended by the assessee before the remittance in question is made to British India. If the entire income is spent by the assessee before any remittance is made, it cannot be said that the remittance is one of profits. Now it is not necessary that an assessee should spend his income only after it has been ascertained for income-tax purposes. He is at liberty to spend it either after ascertaining it in accordance with the Income-tax Act, or before it is ascertained in that manner. In a case where the trading receipts exceed the total amount of expenditure and there is consequently a balance in the hands of the assessee, the money spent prior to the determination of the income (for income-tax purposes), should, in our opinion, be treated as having been spent out of the income. That part of the income which had been spent before the remittances in question were made ceased to be income and, therefore, could not be brought into British India as such. Thus, for the purpose of determining the question whether the entire income chargeable under the Income-tax Act was available at the time of the remittance to British India, expenditure, although not admissible under S. 10 (2), Income-tax Act, must be taken into consideration. The excess of profits and gains, as determined under the Income-tax Act, over the inadmissible expenditure would represent the amount available for transmission to British India and it will be this excess which should be treated as a remittance of profits.

[7] We have indicated above how and for what purpose the expenses admissible under S. 10 (2) and those not so admissible are to be deducted from the gross profits and our answer to the question formulated by the Tribunal is in the affirmative. As regards costs, our order is that the Commissioner of Income-tax must pay the costs of the assessee which we assess at Rs. 200. We certify that counsel for the Department is entitled to Rs. 200 as his fee and he is allowed six weeks' time within which to file his certificate.

D.H.

*Answer in the affirmative.*

**\*A. I. R. (34) 1947 Allahabad 157 [C. N. 73]**  
MOOTHAM AND MATHUR JJ.

*Bireswar Banerji and others — Defendants—Appellants v. Maharaja Sri Sudhansu Shekhar Singh Deo—Plaintiff—Respondent.*

First Appeal No. 313 of 1945, Decided on 18-11-1946.

(a) Civil P. C. (1908), O. 40, R. 1 (2) (as amended in Allahabad) — Effect of amendment — No question as to dispossession of person not party to suit — Court has unfettered discretion to appoint receiver — Court can appoint receiver of property subject of simple mortgage.

The effect of the amendment of sub-rule (2) is that in a case in which no question arises as to the dispossession of a person not a party to a suit the Court has an unfettered discretion under sub-rule (1) to appoint a receiver whenever it appears to it to be just and convenient. A Court has, therefore, power to appoint a receiver of property the subject of a simple mortgage in a suit by the mortgagee against the mortgagor in possession of the mortgaged property : 23 A. I. R. 1936 All. 495 (F. B.) and 30 A. I. R. 1943 All. 1 (F. B.), *Ref.*  
[Para 3]

C. P. C.—

('44-Com.) O. 40, R. 1, N. 4, Pts. 1 to 3; N. 49, Pts. 6 to 8.

\*(b) Civil P. C. (1908), O. 40, R. 1—Just and convenient — Simple mortgage — Interest in arrear— Fact does not render receiver's appointment of mortgaged property just or convenient— Fact that mortgagor's object is merely to delay final determination of suit makes no difference.

The question whether the appointment of a receiver of property the subject of a simple mortgage upon proof that interest is in arrear is just and convenient must be determined on general principles and without reference to the English authorities save in so far as they lay down principles of general application. [Para 9]

The general ground upon which the Court appoints a receiver is the protection of property for the benefit of the persons who have an interest in it. In the case of a simple mortgage the property in which the mortgagee has an interest is limited to that which he can cause to be sold in the event of the mortgagor failing to pay in accordance with his contract; in the absence of specific provision to that effect, the rents and profits of the property belong to the mortgagor and do not form part of the security for the repayment either of the mortgage debt or of the interest thereon. Therefore, *prima facie*, the fact that interest is in arrear will not alone be enough to render the appointment of a receiver of the mortgaged property or of the rents or profits thereof either just or convenient; and the additional fact that the mortgagor's conduct may have been such as to warrant the conclusion that his object is merely to delay the final determination of the suit, does not make any difference, unless the Court is satisfied that the effect of such conduct will be not merely to postpone but to imperil the realization by the mortgagee of the amount secured by the mortgage. The question of what is "just and convenient" must further be considered with reference to the contractual relationship of the parties. The right of the mortgagee is to bring the mortgaged property to sale; he has no right to take possession of the mortgaged property nor to require the mortgagor to utilize the rents and profits of that property in payment of interest on the mortgage debt. The appointment of a receiver in such circumstances to take possession of rents and profits which do not form part of the security, in order that such rents and profits may ultimately be made over to



the mortgagee, confers upon the latter a benefit for which no provision is made in the contract and which the non-payment of interest, considered by itself, cannot justify : *Case law discussed.* [Para 10]

C. P. C. —

(‘44-Com.) O. 40, R. 1, N. 4, Pt. 13.

*P. L. Banerji and S. K. Verma*—for Appellants.

*I. B. Banerji and J. N. Chatterji*—for Respondent.

*Cases referred :—*

1. (‘36) 58 All. 949 : 23 A. I. R. 1936 All. 495 : 163 I. C. 481 (F. B.), *Anandi Lal v. Ram Sarup*.
2. (‘43) 30 A. I. R. 1943 All. 1 : 204 I. C. 210 (F. B.), *Mt. Tulsha Devi v. Sah Chiranji Lal*.
3. (‘24) 41 C. L. J. 203 : 12 A. I. R. 1925 Cal. 664 : 81 I. C. 375, *Ram Kumar Lal v. Chartered Bank of India, Australia and China*.
4. (‘20) 47 Cal. 418 : 7 A. I. R. 1920 Cal. 545 : 56 I. C. 839, *Rameshwar Singh v. Chuni Lal*.
5. (‘39) 1 L. R. 1939 Bom. 82 : 26 A. I. R. 1939 Bom. 54 : 179 I. C. 821, *Damodar Moreshwar v. Radhabai Damodar*.
6. (‘33) 56 Mad. 915 : 20 A. I. R. 1933 Mad. 570 : 145 I. C. 449 (F. B.), *Paramasivan Pillai v. Ramasami Chettiar*.
7. (‘35) 16 Lah. 366 : 22 A. I. R. 1935 Lah. 17 : 157 I. C. 474, *Gobind Singh v. Punjab National Bank Ltd.*
8. (‘36) 14 Rang. 292 : 23 A. I. R. 1936 Rang. 290 : 163 I. C. 850, *Ally Ramzan Yezdi v. Balthazar & Sons Ltd.*
9. (‘32) 19 A. I. R. 1932 Pat. 360 : 142 I. C. 300, *Nrisingha Charan v. Rajniti Prasad Singh*.
10. (‘39) 1939 Rang. L. R. 403 : 26 A. I. R. 1939 Rang. 321 : 183 I. C. 728 (F. B.), *Ma Hnin Yeik v. Chettiar Firm*.
11. (1914) 1 K. B. 693 : 83 L. J. K. B. 479 : 110 L. T. 181, *Vaccum Oil Co., Ltd. v. Ellis*.
12. (1914) 1 Ch. 954 : 83 L. J. Ch. 666 : 110 L. T. 759, *In re Crompton & Co., Ltd.; Player v. Crompton & Co., Ltd.*
13. (‘96) 23 I. A. 32 : 19 Mad. 249 : 7 Sar. 10 (P. C.), *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu*.
14. (1877) 4 Ch. D. 605, *Carter v. Wake*.
15. (‘34) 1934 A. L. J. 561 : 21 A. I. R. 1934 All. 772 : 150 I. C. 1035, *Ram Prasad v. Bishambhar Nath*.

**Mootham J.**—This case raises two questions of importance, first, whether this Court has power under O. 40, Civil P. C., to appoint a receiver of property the subject of a simple mortgage and, secondly, if it has that power, whether the appointment should be made where the principal ground upon which it is sought is the non-payment of interest by the mortgagor.

[2] The facts can be briefly stated. On 3rd July 1934, Babu Panchanan Banerji, who has since died and is represented by the appellants, borrowed the sum of Rs. 8,00,000 from the Maharaja of Sonapur, and as security for the loan and for the interest payable thereon he executed a simple mortgage of property situate in Bengal and the United Provinces. It was agreed that the loan should bear interest at the rate of six per cent. per annum payable half yearly for two years and thereafter at seven per cent. payable annually. At the time the loan was taken Babu Panchanan Banerji's property was under the management of the Court of Wards,

and the deed of mortgage was accordingly executed by the Special Manager of the Court of Wards of Bengal. In 1938 Babu Panchanan Banerji died, and three years later the mortgaged properties were released from the management of the Court of Wards. Interest on the loan appears to have been paid until the year 1940, but thereafter it fell into arrears and on 3rd September 1941, the Maharaja of Sonapur instituted a suit in the Court of the Civil Judge of Benares for the sale of the mortgaged property. The suit was contested by the defendants, who not only contended that the Special Manager had no authority to execute a mortgage and that there was no legal necessity for the loan, but that no mortgage was in fact executed and, indeed, that no loan was ever taken. The learned Civil Judge rejected the various pleas in defence except one. He was of opinion that the Special Manager had no authority to mortgage the United Provinces property, and on 28th May 1943 when he passed a preliminary mortgage decree for the full amount claimed he accordingly declared that the mortgaged property was limited to that situated in Bengal. From this decree both parties have appealed.

[3] In the year 1936 the question whether a Court was competent to appoint a receiver of a property the subject of a simple mortgage pending the decision of an appeal from a preliminary mortgage decree was considered by a Full Bench of this Court in 58 ALL. 949.<sup>1</sup> The argument before the Court, and the answers given to the questions propounded, turned wholly upon the construction of sub-r. (2) of R. 1 of O. 40, Civil P. C. That sub-rule then read as follows:

“(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.”

and the Full Bench was unanimously of opinion that the words “any person” in the sub-rule included all persons whether parties to the suit or not. Taking this view Sir Shah Sulaiman C. J. answered the question referred to the Bench by saying:

“My answer to the question referred to us, therefore, is that though there is no objection to the mere appointment of a receiver of any property, the Court cannot remove from the possession or custody of the property any person, whether a party to the suit or not, whom any party to the suit has not a present right so to remove.”

Thom J., as he then was, concurred in the answer given by the Chief Justice and Rachhpal Singh J. was of opinion that no receiver could be appointed unless the party applying for the appointment could establish that he had a present right to remove the opposite party from the possession and custody of the mortgaged



property. Observations made by the learned Judges constituting the Bench as to the propriety of a receiver being appointed at the instance of a simple mortgagee were, in these circumstances, obiter. Doubt having arisen as to whether the construction placed upon sub-r. (2) in 58 ALL. 949<sup>1</sup> was not unduly narrow, a subsequent Full Bench of this Court in A. I. R. 1943 ALL. 1,<sup>2</sup> considered that the sub-rule should be so amended that no doubt should remain as to its meaning. Sub-rule (2) was accordingly amended on 10th July 1943, by the insertion after the word "person" of the words "not being a party to the suit." The effect of the amendment is clear: in a case in which no question arises as to the dispossession of a person not a party to a suit the Court has an unfettered discretion under R. 1 to appoint a receiver whenever it appears to it to be just and convenient so to do.

[4] The second question, whether it would be proper for this Court to appoint a receiver in the circumstances of the present case is more difficult. There is no allegation of waste; all that is said is that interest on the mortgage debt has been unpaid for several years and that the conduct of the present representatives of the original mortgagor has been such as to give rise to the reasonable apprehension that they will adopt every device which the law permits to delay the final determination of the mortgagee's claim. Sir Tej Bahadur Sapru, on behalf of the mortgagee, has argued that the appointment of a receiver is necessary to ensure that the mortgagee shall ultimately receive that to which he is entitled, and he has in particular drawn our attention to the case in 41 C. L. J. 203<sup>3</sup> in which an appellate Bench of the Calcutta High Court declined to interfere with an order of C. C. Ghose J. who had, at the instance of a mortgagee by deposit of title deeds, appointed a receiver upon the sole ground that a considerable sum due by way of interest was unpaid. Sir Tej has further pointed out that an equitable mortgagee in England is entitled to the appointment of a receiver as of course if the interest on the loan is in arrear, and he has argued that this Court should in this matter follow the English practice.

[5] The course of authority in India is not uniform. The High Courts at Calcutta, Bombay, Madras and Lahore, and, until 1939, the High Court at Rangoon, have acted upon the view that the principles upon which a Court in England will appoint a receiver on the application of an equitable mortgagee should guide the Courts in India when a similar application is made by a mortgagee on the basis of a simple mortgage or a mortgage by deposit of title deeds: see 47 Cal. 418,<sup>4</sup> I.L.R. (1939) Bom. 82,<sup>5</sup> 59

Mad. 915,<sup>6</sup> 16 Lah. 366<sup>7</sup> and 14 Rang. 292,<sup>8</sup> but this view has not been accepted by the Patna High Court and has recently been dissented from by the Rangoon High Court: see A. I. R. 1932 Pat. 360<sup>9</sup> and 1939 Rang. L. R. 403.<sup>10</sup>

[6] In India a Court derives its power to appoint a receiver from the provisions of O. 40, Civil P. C., and from no other source; and it is, I think, the failure to bear this in mind which has led to the conflict of opinion on the question under consideration. Order 40, R. 1 is based on sub-s. (8) of S. 25, Judicature Act of 1873 (36 and 37 Vict., c. 66) — since replaced by S. 45, Judicature Act of 1925 (15 and 16 Geo. V, c. 49) — but the appointment of receivers in England in the case of equitable mortgages and charge is not made in exercise of the Court's statutory powers but in exercise of the jurisdiction formerly vested in the Court of Chancery, and which since the passing of the Judicature Acts vests in the High Court of Justice. The appointment of a receiver at the instance of an equitable mortgagee was one of the oldest remedies of the Court of Chancery; it was made *ex debito justitiæ* because of the absence or inadequacy of the mortgagee's remedy at common law. That remedy was originally and still is, in form, discretionary; but it had for so many years been the practice of the Court of Chancery to appoint a receiver at the instance of an equitable mortgagee if the interest payable under the security was in arrear, or if the security itself was in danger, that it would perhaps not be wrong to say that the remedy has, as it were, crystallised into a right to the benefit of which the mortgagee is now ordinarily entitled as of course. In (1914) 1 K. B. 693<sup>11</sup> at p. 703, Buckley L. J. said:

"In the absence of express contract between the mortgagor and second mortgagee of lands entitling the latter to take possession with the consequent right to take the rents, the rights of the second mortgagee are as follows: He can, subject to the rights of the first mortgagee, take possession and enter into the receipt of the rents in either one of two ways:—(a) in an action to enforce his security he can obtain an order appointing a receiver, or (b) under the Conveyancing Act he can himself appoint a receiver. In the one case he obtains judicially and in the other contractually and by virtue of the statute a right to take the rents by the hand of a receiver. But his only remedy is the appointment of a receiver; he has no legal right to take possession or to demand payment to himself of the rents. If he serves notice on the tenant requiring the tenant to pay the rent to him, the tenant may refuse payment, for he will get no discharge. The second mortgagee could not sue the tenant for the rent. He has no legal right in the land demised."

and in (1914) 1 Ch. 954<sup>12</sup> at p. 967, Warrington J., said:

"I think the right to the appointment of a receiver is one of the ordinary rights which accrue to a mortgagee, and especially to an equitable mortgagee who has no means of taking possession and whose security



has become realizable as one of the steps in such realization."

[6] In India a simple mortgage is a creation of statute; under S. 58 (b), T. P. Act the mortgagor binds himself personally to pay the mortgage money, and he agrees that in the event of his failing to pay in accordance with his contract the mortgagee shall have the right to cause the mortgaged property to be sold. The mortgagor retains possession of the mortgaged property, and in default of payment the right which accrues to the mortgagee is "a right, not to possession but sale, which he must work out in execution proceedings," 23 I. A. 32.<sup>13</sup> Although in a fit case the Court has an undoubted right to appoint a receiver at the instance of a simple mortgagee, no right to such an appointment is given to the mortgagee by statute nor, where the only ground upon which such appointment is sought is the failure of the mortgagor to pay interest on the mortgage money, is there, in my opinion, any settled practice in India outside Bengal, and certainly not in this Province, that a receiver will be appointed. I am not aware of any reported case in which a receiver has been appointed at the instance of a mortgagee (where the transaction was not an English mortgage) upon the sole ground that interest payments were in arrear, other than 41 C. L. J. 203<sup>3</sup> to which reference has already been made. And in that case there was not discussion of the question whether the appointment was "just and convenient," the ground upon which the order was made being stated by C. C. Ghosh J. at p. 205, in these words :

In these circumstances, the question arises whether the plaintiff ought not to be granted the ordinary relief in suits on mortgage namely whether he ought not to be allowed a receiver to take charge of the mortgaged premises. The practice in suits on mortgage, where the interest is in arrear, is to order the appointment of a receiver as a matter of course. This has been the practice which has been followed in this Court by a long succession of Judges who have sat on the Original Side. Therefore, the mortgagee plaintiff would *prima facie* be entitled to a receiver."

There is a passage (at p. 930) in the judgment of Ramesam J. in 56 Mad. 915<sup>6</sup> which suggests that a receiver had been appointed in that case—a suit on a simple mortgage—on the ground that interest was in arrear, but from the summary of the facts at p. 919 of the report it appears that the real ground was the insufficiency of the security to discharge the decree. In I. L. R. (1939) Bom. 82<sup>5</sup> Beaumont C. J. expressly reserved his opinion as to whether interest being in arrear by itself would have been sufficient to justify the appointment of a receiver.

[7] In my opinion the decisions of the Courts of England as regards the appointment of receivers at the instance of an equitable mortgagee

must be treated with reserve. For, in the first place, such decisions are based on equitable practice of ancient origin and, in the second place, the incidents of a simple mortgage are not the same as those which attach to an equitable mortgage in England. It may perhaps be doubted whether the view of Courtney-Terrell C. J. in A. I. R. 1932 Pat. 360<sup>9</sup> that there is the same difference between a simple mortgagee and equitable mortgagee as between the former and a legal mortgagee under Indian law does go too far, but it is clear that although neither the equitable mortgagee in England nor the simple mortgagee in India possessed as part of the interest transferred to him the right to possession, an equitable mortgage operated as an executory assurance which, so far as equitable rights and remedies were concerned, was equivalent to an actual assurance: (1877) 4 Ch. D. 605.<sup>14</sup> A legal mortgagee was able to ensure that the rents and profits of the mortgaged property were applied in keeping down the interest on the mortgage debt by entering into possession of the mortgaged property; and it was because an equitable mortgage carried with it, as far as possible, the remedies incident to a legal mortgage that a Court of Equity, being unable to put the equitable mortgagee into possession, would appoint a receiver if the interest were in arrears.

[8] In 1934 A. L. J. 561,<sup>15</sup> the only other decision of this Court to which reference need be made, a simple mortgagee had, after obtaining a preliminary mortgage decree, secured an order from the trial Court directing the tenants of the mortgaged property to pay the sums due from them by way of rent into Court. An appeal to this Court was allowed on the ground that until the mortgaged property was brought to sale the usufruct belonged to the mortgagor or his transferee. Both learned Judges (Bennet and Mukerji, JJ.) expressed their dissent from the view taken in 56 Mad. 915,<sup>6</sup> as to the applicability of the English decisions as to the circumstances in which a receiver could properly be appointed at the instance of an equitable mortgagee.

[9] As there is no practice in this province, such as appears to exist in Bengal, entitling a simple mortgagee to obtain the appointment of a receiver of the mortgaged property upon proof that interest is in arrear, the question whether such appointment is "just and convenient" must be determined on general principles and without reference, I think, to the English authorities save in so far as they lay down principles of general application.

[10] The general ground upon which the Court appoints a receiver is the protection of



property for the benefit of the persons who have an interest in it. In the case of a simple mortgage the property in which the mortgagee has an interest is limited to that which he can cause to be sold in the event of the mortgagor failing to pay in accordance with his contract; in the absence of specific provision to that effect the rents and profits of the property belong to the mortgagor and do not form part of the security for the repayment either of the mortgage debt or of the interest thereon. It appears to me, therefore, that *prima facie* the fact that interest is in arrear will not alone be enough to render the appointment of a receiver of the mortgaged property or of the rents and profits thereof either just or convenient. And I am unable to see that the additional fact that the mortgagor's conduct may have been such as to warrant the conclusion that his object is merely to delay the final determination of the suit makes any difference, unless the Court is satisfied that the effect of such conduct will be not merely to postpone but to imperil the realization by the mortgagee of the amount secured by the mortgage. The question of what is "just and convenient" must further, I think, be considered with reference to the contractual relationship of the parties. The right of the mortgagee is to bring the mortgaged property to sale; he has no right to take possession of the mortgaged property nor to require the mortgagor to utilize the rents and profits of that property in payment of interest on the mortgage debt. The appointment of a receiver in such circumstances to take possession of rents and profits which do not form part of the security, in order that such rents and profits may ultimately be made over to the mortgagee, confers upon the latter a benefit for which no provision is made in the contract and which in my view the non-payment of interest, considered by itself, cannot justify.

[11] The question whether the insufficiency of the mortgaged property to satisfy the mortgage debt, taken alone or in conjunction with the mortgagor's failure to pay interest is a ground sufficient to justify the appointment of a receiver is not now before us, and I express no opinion upon the point. For these reasons this application must in my opinion be rejected, with costs.

**Mathur J.** — I entirely agree.

V.R.

*Application rejected.*

**A. I. R. (34) 1947 Allahabad 161 [C. N. 74]**

**WALI ULLAH AND BENNETT JJ.**

*Mahadeo Prasad v. Ghulam Mohammad.*

Second Appeal No. 843 of 1941, De'd on 30-1-1946, from order of Civil Judge, Allahabad, D/- 17-5-1941.

(a) Hindu Law — Widow — Widow in possession as limited owner cannot transfer property by will. [Para 9]

(b) Evidence Act (1872), S. 68—Document not *per se* inadmissible—Objection that it has been improperly admitted cannot be raised in appeal—Proper place for it is trial Court—Civil P. C., O. 41, R. 1.

The objection that the document which *per se* is not inadmissible in evidence, has been improperly admitted in evidence, in the trial Court, cannot be entertained in the Court of appeal. If such an objection had been taken in the trial Court it might have been easily met and the proceedings regularised : 18 A. I. R. 1931 Pat. 224; 2 A. I. R. 1915 P. C. 111; 34 Cal 1059 (P. C.) and 10 A. I. R. 1923 Cal. 378, *Ref.* [Para 9]

C. P. C.—('44-Com) O. 41, R. 1, N. 12, Pt. 19.

(c) Evidence Act (1872), S. 68 — Section applies only if document is relied upon as one requiring attestation—Use of document for collateral purpose—Non-compliance with S. 68 is no bar.

Section 68 applies only if a document is relied upon as one requiring attestation e. g. a will. Non-compliance with the provisions of S. 68, however, does not prevent the document from being used in evidence under S. 72 for any other or collateral purpose : 2 A.I.R. 1915 All. 254; 5 A. I. R. 1918 All. 201 and 26 A. I. R. 1939 All. 269, *Ref.* [Para 9]

(d) Evidence Act (1872), S. 32 (5) — Statement relating to relationship—Meaning of — Question of relationship includes commencement of relationship—Declaration of deceased admissible to prove date of birth, age, minority or majority or order of seniority in birth and also to prove parentage, names of relations or date of death which means only terminations of relationship — Suit by reversioner claiming property after death of widow as next reversioner of K—Defence that K predeceased his father B whose reversioners and not plaintiff were entitled to succeed—Statement by widow in a will before dispute that K, her son, predeceased B, his father, held admissible under S. 32 (5).

Under S. 32 (5) a statement relating to the existence of any relationship by blood, marriage or adoption is admissible to prove the facts mentioned in the statement. As the question as to the existence of any relationship also includes the question as to the commencement of that relationship declarations of deceased competent declarants have been held to be admissible to prove a person's date of birth, and, consequently his age, minority or majority or the order in which the members of the family were born. Such declarations have also been held to be admissible to prove parentage, names of relations or the date of death of a member of the family as death implies the termination of a relationship just as birth implies its commencement: *Case law discussed.* [Para 15]

After the death of a Hindu widow, S, plaintiff sued to recover the property as the next reversioner of her son K. It was contended in defence that K had predeceased his father B and hence B's next reversioner and not the plaintiff was entitled to succeed to the property. A statement in a will by S made long before the dispute arose to the effect that her son K had predeceased his father B was relied on by the defence:

*Held*, the statement was admissible in evidence under S. 32 (5). [Para 16]

*P. L. Banerji and N. Upadhyaya*—for Appellant.

*Walter Dutt, P. N. Haksar and B. S. Darbari* — for Respondent.

*Cases referred :—*

1. (1883) 13 Q. B. D. 818 : 53 L. J. Q. B. 521 : 51 L. T. 645 : 33 W. R. 99, *Haines v. Guthrie.*



2. ('31) 18 A. I. R. 1931 Pat. 224 : 131 I. C. 788, Lachuman Lal Pathak v. Kamakhya Narayan Singh.
3. ('15) 2 A. I. R. 1915 P. C. 111 : 93 P. R. 1915 : 29 I. C. 807 (P. C.), Padman v. Hanwanta.
4. ('07) 34 Cal. 1059 : 34 I. A. 194 (P. C.), Shahzadi Begam v. Secy. of State.
5. ('23) 10 A. I. R. 1923 Cal 378 : 72 I. C. 985, Sayeruddin Akonda v. Samiruddin Akonda.
6. ('15) 13 A. L. J. 553 : 2 A. I. R. 1915 All. 254 : 29 I. C. 363, Mathura Prasad v. Chheddilal.
7. ('18) 16 A. L. J. 121 : 5 A. I. R. 1918 All. 201 : 40 All. 256 : 44 I. C. 596, Moti Chand v. Lalta Prasad.
8. ('39) 1939 A. L. J. 142 : 26 A. I. R. 1939 All. 269 : I. L. R. (1939) All. 366 : 181 I. C. 612, Shyam Lal v. Lakshmi Narain.
9. ('28) 15 A. I. R. 1928 P. C. 2 : 7 Pat. 221 : 55 I. A. 18 : 107 I. C. 14 (P. C.), Mt. Ramanandi Kuer v. Mt. Kalawati Kuer.
10. ('16) 3 A. I. R. 1916 P. C. 242 : 43 I. A. 256 : 39 I. C. 401 (P. C.), Mahomed Syedol Ariffin v. Yeoh Ooi Gark.
11. ('93) 20 Cal 758, Ram Chandra Dutt v. Jogeshwar Narain Deo.
12. ('97) 24 Cal. 265 (S. B.), Dhanmull v. Ram Chunder Ghose.
13. ('02) 25 Mad. 183, Oriental Government Security Life Assurance Co. v. Narasimba Chari.
14. ('34) 21 A. I. R. 1934 All. 406 : 56 All. 766 : 149 I. C. 781 (F. B.), Mt. Naima Khatun v. Basant Singh.
15. ('27) 14 A. I. R. 1927 Oudh 278 : 104 I. C. 299, Krishnapal Singh v. Sri Raj Kuar.
16. ('44) 31 A. I. R. 1944 Oudh 162 : 20 Luck 108, Kanhaiya Bux Singh v. Mt. Ram Dei Kuer.

**Wali Ullah J.**—This is a plaintiff's appeal against the decree passed by the lower appellate Court which set aside the decree passed by the Court of first instance and dismissed the suit with costs throughout. The plaintiff claimed a declaration that the house No. 185 (new) situate in Sabzi Mandi, Allahabad, belonged to him and in the alternative, he also prayed for possession of the same. It was alleged that the plaintiff was the next reversioner of one Kallu Ram and that after the death of Kallu Ram Mt. Sahodra, the mother of Kallu Ram, succeeded to the property as the mother of Kallu Ram, that Mt. Sahodra sold the house to the defendant under a sale-deed dated 20-10-1938 for Rs. 4000 but there was no legal necessity for the same. Lastly it was alleged that Mt. Sahodra died on 1-2-1939 and the plaintiff was consequently entitled to the possession of the house as the next reversioner of Kallu Ram.

[2] The suit was resisted *inter alia* upon the ground that the pedigree set out in the plaint was not complete and that Bhau Ram, who was the original owner of the house, had a sister Mt. Gulabo whose sons were alive. It was further alleged that Kallu Ram had died during the lifetime of his father Bhau Ram and that Mt. Sahodra succeeded to the property as the widow of Bhau Ram. On the death of Mt. Sahodra the next reversioners of Bhau Ram according to law were the sons of a sister of Bhau Ram who are still alive and the plaintiff

was, therefore, not the next reversioner. It was further alleged that in any event the house was sold for legal necessity and for consideration and the sale was, therefore, binding upon the next reversioner.

[3] On the issue whether Bhau Ram died first or Kallu Ram predeceased Bhau Ram, the learned Munsif found that Bhau Ram died 29 or 30 years before the suit in 1939 but that Kallu Ram died on 30-10-1918 and, therefore, Kallu Ram was the last male holder of the property in suit. He accordingly held that although Bhau Ram's sister's sons were alive the last male owner being Kallu Ram himself, the plaintiff, as the next reversioner of Kallu Ram, had the right to sue. On the question of legal necessity, the Court of first instance was of the opinion that out of the consideration of Rs. 4000 paid by the defendant, only a sum of Rs. 890 was for legal necessity. In view of these findings the suit was decreed for possession on condition that the plaintiff deposited a sum of Rs. 890 in Court within a period of two months for payment to the defendant.

[4] On appeal, the learned Civil Judge found that Kallu Ram predeceased Bhau Ram and, therefore, in the presence of the sons of a sister of Bhau Ram, the plaintiff was not the next reversioner of Bhau Ram and consequently he was not entitled to sue as such. On the issue relating to legal necessity the lower appellate Court found itself in agreement with the Court of first instance. In view of its finding, however, that Kallu Ram predeceased Bhau Ram, obviously the plaintiff had no right to institute the present suit. The appeal was accordingly allowed and the suit was dismissed with costs throughout.

[5] Learned counsel for the appellant has strenuously contended that the finding of fact recorded by the lower appellate Court to the effect that Kallu Ram predeceased Bhau Ram is vitiated in law inasmuch as it rests substantially upon the recitals of a will executed by Mt. Sahodra on 10-9-1934 and that this will has not been proved according to law. Learned counsel for the appellant has invited our attention to S. 63, Succession Act, 39 [XXXIX] of 1925 which provides that a will like the will of Mt. Sahodra shall be attested by at least two witnesses. Learned counsel has next referred us to the provisions of S. 68, Evidence Act, regarding the manner of proof of a document required by law to be attested. His contention is that the provisions of S. 68, Evidence Act, have not been complied with inasmuch as no attesting witness has been called by the defendant. The contention of the learned counsel in effect comes to this that the deed, dated 10-9-1934 purporting to be



a will of Mt. Sahodra could not be used in evidence for any purpose in this case unless the provisions of s. 68, Evidence Act, were fully complied with. Lastly the learned counsel has contended that any statement contained in the will of Mt. Sahodra would not be admissible in evidence under s. 32 (5) (6), Evidence Act, and he has in support of his contention relied upon the well-known case in (1883) 13 Q. B. D. 818.<sup>1</sup>

[6] In order to appreciate the points raised by the learned counsel for the appellant, it is necessary to state some relevant facts. On the issue whether Kallu Ram predeceased Bhau Ram—and that was the principal issue in the case—parties led oral as well as documentary evidence. The plaintiff examined himself and four witnesses, viz., Nandoo and Ram Narain two sons of Bhau Ram's sister, Deep Narain, and Mathura Prasad who is a son-in-law of Bhau Ram. On his part the defendant examined himself, Sheo Charan, Prag Datt and Murtaza Husian. In addition to this oral evidence, there was also before the Courts below some documentary evidence including an extract from the municipal  *khasra*  which showed that after the death of Bhau Ram the name of his widow Mt. Sahodra was mutated and not that of his son Kallu Ram. There was also the will of Mt. Sahodra dated 10-9-1934.

[7] The learned Munsif, on a consideration of the evidence led by the parties came to the conclusion that the evidence adduced by the plaintiff was more reliable than that of the defendant. He, however, did not consider the recitals in the will of Mt. Sahodra to the effect that her husband (Bhau Ram) was the owner of the property and that about 22 years back after the death of his only son Kallu Ram, he installed the deity of Shri Thakurji Maharaj in house No. 13. The reason seems to be that according to the learned Munsif no attempt had been made to prove the will according to the provisions of s. 68, Evidence Act and it was also otherwise a nullity at law.

[8] When the case came in appeal before the learned Judge, he, on a consideration of the oral evidence adduced by the parties, was of the opinion that but for the recitals aforementioned, contained in the will of Mt. Sahodra, he would not have been inclined to disturb the finding of the learned Munsif. He, however, considered the recitals aforementioned, contained in the will of Mt. Sahodra to be the most reliable piece of evidence in the case and in view of this evidence he found it impossible to believe the plaintiff's evidence. The result, therefore, was that he, in effect, relying on the recitals in the will held that Kallu Ram predeceased Bhau Ram.

[9] The main question which has to be decided in this appeal is whether the statement contained in Mt. Sahodra's will referred to above was admissible in evidence and the learned Judge was right in relying on the same. It must be remembered that in the present case we are not concerned with the validity or invalidity of the will as such. It is obvious that Mt. Sahodra, being in possession of the property as a limited owner under the Hindu Law, whether as the widow of the last owner Bhau Ram or as the mother of the last owner Kallu Ram had no right to transfer the property by will. Section 68, Evidence Act would certainly come into play if any of the two parties to this litigation had founded his claim on the will but that is not the case here. This will of Mt. Sahodra is a registered document and it has been specifically referred to in the sale deed in favour of the defendant. It has been exhibited by the Court of first instance as Ex. QQ and, therefore, it is clear that it was tendered in evidence. The statement of the defendant's witness, Sheo Charan, in favour of whose wife Mt. Moti Kunwar, the will was executed, has definitely stated in the course of his deposition that Mt. Sahodra executed "a will" in favour of his wife Moti Kunwar in 1934. No objection seems to have been raised in the course of the proceedings in the Court of first instance with regard to the existence of this will or its execution by Mt. Sahodra. A glance at the statement of Sheo Charan would show that first of all he referred to this will in his examination in-chief. In cross-examination learned counsel for the plaintiff appears to have repeatedly questioned Sheo Charan with reference to this will, but the questions were all put to the witness with a view to eliciting from him the facts bearing upon the invalidity of the will. It is true that the will Ex. QQ does not bear on it any statement to the effect that its execution was admitted, but on a careful examination of the long statement of Sheo Charan there can be no doubt whatsoever that the cross-examination of Sheo Charan proceeded on the footing that the registered document dated 10-9-1934 purporting to be a will of Mt. Sahodra was a document executed by Mt. Sahodra.

[9a] It must, therefore, be taken that the only contention raised on behalf of the plaintiff with regard to this document in the trial Court was that it has not been proved in accordance with the provisions s. 68, Evidence Act. And it is well settled that an objection that a document which *per se* is not admissible (inadmissible?) in evidence, has been improperly admitted in evidence in the trial Court, cannot be entertained in the Court of appeal. If such an objection had been taken in the trial Court it might have been



easily met and the proceedings regularised: *vide* A. I. R. 1931 Pat. 224,<sup>2</sup> A. I. R. 1915 P. C. 111,<sup>3</sup> 34 Cal. 1059 : 34 I. A. 194<sup>4</sup> and A. I. R. 1923 Cal. 378.<sup>5</sup> As mentioned already, S. 68 would apply only if the document were relied upon as a will and therefore as a document requiring attestation. It has been repeatedly held that non-compliance with the provisions of S. 68 does not prevent the document from being used in evidence under S. 72 for any other or collateral purpose. Reference might be made to the case in 13 A. L. J. 553;<sup>6</sup> also to the case in 16 A. L. J. 121.<sup>7</sup> Similarly reference might be made to the decision of a Bench of two learned Judges of this Court in 1939 A. L. J. 142.<sup>8</sup>

[10] Next it has to be considered whether the statement of Mt. Sahodra contained in this will to the effect that Kallu Ram predeceased Bhau Ram is admissible in evidence under S. 32 (5) (6), Evidence Act. Admittedly Mt. Sahodra is dead and in the year 1934 no dispute had arisen between the parties as to whether Bhau Ram at the time of his death had left a son Kallu Ram. It is obvious that Mt. Sahodra, being the wife of Bhau Ram and the mother of Kallu Ram, had special means of knowledge. The only question, therefore, is whether the statement in question relates to 'the existence of any relationship by blood, marriage or adoption.' Learned counsel for the appellant contends that the statement is not admissible and he has strongly relied upon the well-known English case, (1883) 13 Q. B. D. 818,<sup>1</sup> in which all the authorities in the English law on this point are fully considered; but there can be no doubt whatsoever that on this point the law in India under the Evidence Act is very different from the law of England. Reference might be made to Woodroffe and Ameer Ali's Law of Evidence, 9th edition, pp. 354 and 355, where the distinction has been clearly brought out. It is specifically noted therein that the principle laid down in (1883) 13 Q. B. D. 818<sup>1</sup> is not the law in India. In this connection reference might be made to some very salutary observations made by their Lordships of the Privy Council in A. I. R. 1928 P. C. 2<sup>9</sup> at p. 4, where their Lordships are reported to have observed :

"It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature, the proper course is to examine the language of that Statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded."

[11] On the other hand, the learned counsel for the respondent has contended that the statement in question is admissible under S. 32 (5), Evidence Act. He has invited our attention to the decision of their Lordships of the Privy

Council in A. I. R. 1916 P. C. 242; 43 I. A. 256<sup>10</sup> where it was held that entries in the book of births and deaths in the family kept by the father having special means of knowledge and made before any dispute or question arose between the parties are admissible under this section to prove the age of the person mentioned therein. Their Lordships in the course of their judgment approved of the decisions of the Calcutta High Court in the cases in 20 Cal. 758,<sup>11</sup> 24 Cal. 265<sup>12</sup> and of the Madras High Court in 25 Mad. 183.<sup>13</sup> Their Lordships have also referred to illustration L appended to S. 32. In this connection reference might also be made to the Full Bench case in A. I. R. 1934 ALL. 406,<sup>14</sup> where in the order of reference to the Full Bench at p. 407, their Lordships Sulaiman C. J. and Young J. have observed :

"There can be no doubt that the rule of English Law is particularly strict, and the admission of hearsay evidence in *pedigree cases* is confined to the proof of pedigree and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriage when they have to be proved for other purposes. In (1883) 13 Q. B. D. 818,<sup>1</sup> an affidavit filed by the defendant's father stating the date of the defendant's birth in an action to which the plaintiff had not been a party was held inadmissible as evidence of the age of the defendant in support of his defence. In India we have S. 32, Evidence Act which does not seem to be so strict."

[12] Again, their Lordships observed at p. 409 :

"If we were to take the sub-s. (5) of S. 32 literally, it might in one sense be said that a statement relating to the age of a boy is not a statement relating to the existence of any relationship by blood or by marriage. But it has been laid down by their Lordships of the Privy Council in A. I. R. 1916 P. C. 242,<sup>10</sup> following an observation made by a learned, *Chief Justice* (Judge?) of the Madras High Court, that the question of age falls within this sub-section because it indicates the commencement of such relationship. When a person says that this relation was born on such and such a date, he by implication states that his relationship with the person came into existence on that date. In this view of the matter a statement made as regards age would be tantamount to a statement as to the existence of relationship."

[13] In this case their Lordships were considering the question of the admissibility of a statement contained in the deed of adoption executed by Rani Bishen Kuer, the adoptive mother of the defendant Basant Singh. It was argued before their Lordships that her statement "*that the boy had been previously born on a particular date.*" is no part, of any statement as regards the commencement of relationship with him and is, therefore, not admissible. With reference to this contention their Lordships observed at p. 410.

"It is true that to some extent the statement made by Rani Bishen Kuer, as regards the age of the boy in the deed of adoption, is distinguishable from the admission made by the father as to the age of his son in A. I. R. 1916 P. C. 242.<sup>10</sup> Nevertheless we think that we must



apply the same principle to this case and hold that the statement made by the adoptive mother as regards the age of the boy, although it would not show her own relationship with him, was equally admissible. There is no doubt that their Lordships of the Privy Council have interpreted this sub-section in a liberal sense and it seems to be our clear duty, to follow that example."

[14] Reference might also be made to two cases decided by the Chief Court of Oudh : (1) A.I.R. 1927 Oudh 278.<sup>15</sup> In this case it was held by King J. that :

"Statements made by the deceased members of the family about certain facts of family history and statements regarding the seniority of members of the family are admissible in evidence under S. 32, cl. (5), Evidence Act."

His Lordship further observed :

"It seems necessary to give a very liberal interpretation to the words 'when the statement relates to the existence of any relationship by blood relations.' Otherwise the only evidence of any value regarding matters of family history would be excluded."

(2) A. I. R. 1944 Oudh 162.<sup>16</sup> In this case two learned Judges of Oudh Chief Court agreed with the decision of King J. in A. I. R. 1927 Oudh 278<sup>15</sup> and the decision of the Special Bench of three learned Judges of the Calcutta High Court in 24 Cal. 265.<sup>12</sup> In that case it was argued that S. 32, clause (5) is confined in its scope to statements relating to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship the person making the statement had special means of knowledge and illustrations (k), (l) and (m) merely show that the date of birth, death or marriage may be understood as falling within the words 'existence of any relationship' in so far as such date indicates termination or the commencement of that relationship. It was argued that the statement that a person is an older or younger son of his father in so far as it does not indicate the commencement of relationship does not fall within the ambit of the word 'relationship' as used in that clause. With reference to this argument their Lordships observed at page 183:

"In our opinion a statement whether an ancestor of the person making the statement was related to him as an elder uncle or a younger uncle or an elder brother or a younger brother or an elder son or a younger son is a statement as to relationship within the meaning of S. 32, clause (5). Further we think that if the dates of birth of Sheo Baksh Singh and Guman Singh could be admissible on the ground that they indicated commencement of the relationship with the person making the statement, the statement as to relative seniority is also equally admissible on the same ground showing as it does that the relationship with one commenced earlier than the relationship with the other."

[15] In view of the authorities referred to above it must be held that under S. 32, sub-cl. (5), Evidence Act, a statement relating to the existence of any relationship by blood, marriage or adoption is admissible to prove the facts mentioned in the statement. As the question as to the existence of any relationship also includes

the question as to the commencement of that relationship declarations of deceased competent declarants have been held to be admissible to prove a person's date of birth, and, consequently his age, minority or majority or the order in which the members of the family were born. Such declarations have also been held to be admissible to prove parentage, names of relations or the date of death of a member of the family as death implies the termination of a relationship just as birth implies its commencement.

[16] The statement contained in the will of Mt. Sahodra to the effect that Kallu Ram had predeceased Bhau Ram must, therefore, be taken to be admissible in evidence. The finding of the lower appellate Court that Kallu Ram predeceased Bhau Ram was a perfectly valid finding of fact and is binding upon us in second appeal.

[17] The result, therefore, is that there is no force in this appeal and I would accordingly dismiss it with costs.

**Bennett J.**—I agree.

D.R.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 165 [C. N. 75]**

SINHA J.

*Panda Inderjit — Applicant v. Emperor.*

Criminal Revn. No. 749 of 1946, Decided on 5-9-1946, from order of Sessions Judge, Aligarh, D/-15-4-1946.

Criminal P. C. (1898), S. 103 — Section is mandatory— Search witnesses present not belonging to locality — One of them belonging to rival party of accused and was also challaned in criminal case — Search held was vitiated and prosecution could not be sustained.

The provisions of S. 103 are mandatory and require that the officer in charge of the search should make honest efforts to secure the presence of 'two or more respectable inhabitants of the locality' before undertaking the search, but the search will not be vitiated if no such witness is available. [Paras 9 and 10]

Where neither of the two search witnesses belonged to the locality and one of them belonged to the rival party of the accused and was also challaned in a criminal case under S. 107, Criminal P. C.:

Held that the provisions of S. 103, were not complied with and therefore the prosecution could not be sustained: 21 A. I. R. 1934 All. 374 and 22 A. I. R. 1935 All. 520, *Rel. on.* [Paras 9 and 10]

**Cr. P. C.**

('46-Com) S. 103, Nos. 6, 7.

*Sir Syed Wazir Hasan, P. C. Chaturvedi and Shambhu Prasad — for Applicant.*

*Deputy Government Advocate — for the Crown.*

*Cases referred:—*

1. ('34) 21 A. I. R. 1934 All 374 : 155 I. C. 406, *Sadlu v. Emperor.*
2. ('35) 22 A. I. R. 1935 All. 520 : 154 I. C. 635, *Ramchandra v. Emperor.*
3. ('13) 18 I. C. 149 (Cal), *Rajendra Narayan Singh v. Emperor.*
4. *Cri. Appeal No. 285 of 1934, D/-13-7-1934, Ram Lal v. Emperor.*



**Order.** — This is an application in revision against an order of the learned Sessions Judge of Aligarh by which he, with some modification, affirmed the judgment of a learned Magistrate of the First Class.

[2] The applicant, Panda Inderjit, is a respectable zamindar in Anupshahr, in the district of Bulandshahr. He pays Rs. 5,000 on account of land revenue and also carries on some other business. He has four sons, Anangpal, Bijaipal, Gajrajpal and Ram Rikhpal. The first two are of age and live with their father. The third, Gajraj, is a youth, receiving his education in the Meerut College. The youngest is a minor, studying in some school.

[3] Inderjit and his two sons, Anangpal and Bijaipal, were placed on their trial before a learned Magistrate for an offence under S. 19 (f), Arms Act. After some time, proceedings were taken against Gajrajpal also. Gajrajpal evidently was living away from the house and how the prosecution thought of taking any steps against him defies one's wit. The family, however, may be thankful to it for some mercy when it spared at least Ram Rikhpal.

[4] In November 1942, Sardar Bashir Ahmad Khan, the Sub-Divisional Magistrate of Anupshahr, was informed that Panda Inderjit of village Bailon and his sons were in possession of unlicensed fire arms. While on tour, he made confidential enquiries from different persons and at different places and the above information was, according to him, found to be correct. Mr. Bashir Ahmad Khan, on or about 26-1-1943, conveyed the information to the District Magistrate who directed him to institute a search. Mr. Bashir Ahmad Khan, after arranging for a police lorry and police force, himself decided to raid the house of the accused on 29-1-1943. He, along with the Circle Inspector, Nisar Ahmad Zobairi, and a few police constables, left Bulandshahr for Anupshahr, on the evening of 28-1-1943, and reached their destination in the night. On the following morning with the Tahsildar and the Station Officer of Anupshahr they left for Dibai on the way to village Bailon. At Dibai Mr. Bashir Ahmad Khan sent a message to the Station Officer, Agha Badrul Hasan, and directed him to come over with the Second Officer in charge and a few more constables. After passing Dibai, Budrul Hasan enquired from the Magistrate their destination. The party was then informed that they were going to Bailon to raid the house of Panda Inderjit. On their way, at a place called Kesri Kalan, about three miles from Bailon, they found one Munshi Khan and one Hemraj Singh. They picked them up to witness the search. The Sub-Divisional Magistrate divided his party into two and sent the Tahsildar of

Anupshahr with a small police party to the enclosure of Panda Inderjit, while the others left for his house. A few constables were directed to encircle the house of the Panda while Mr. Bashir Ahmad Khan, the Station Officer of Dibai and the witnesses went to the front of the house of the accused. They called Panda Inderjit but his two sons came out. On enquiry the Deputy Magistrate was told that the Panda was in his enclosure. A constable was sent to call him and he arrived. He was then told that the Deputy Magistrate was previously informed that he was in possession of unlicensed fire-arms and consequently his house would be searched. Inderjit denied the charge. A search followed and a large number of offending articles were found. The above is, in brief, the story for the prosecution.

[5] The accused denied the charge. Their case in the main was that they owed their misfortune to the displeasure of the magistracy. Panda Inderjit had contributed very largely to the various war loans and funds, so much so that he had received *sanads* for his meritorious conduct. The call for subscriptions persisted and a stage came when he could no longer stand the pressure. Either he refused to make any further contributions, or they were not so substantial as they used to be till 1941. This roused the ire of the magistracy and the present prosecution is its result. It was the definite case of the defence that these arms were planted by the police, or the police had managed to have them planted.

[6] The case was, in its initial stages, tried by a Magistrate named Mr. Brij Bahadur. Under the orders of the Hon'ble the Chief Justice it was transferred to Aligarh and Mr. Jagram Singh, the learned Magistrate, found that, although the prosecution had not successfully established a case against Gajrajpal, the case against Inderjit and his two sons, Anangpal and Bijaipal, was made out. In the result, he sentenced each of them to rigorous imprisonment for nine months and a fine of Rs. 1,000 and, in default, to rigorous imprisonment for another period of six months. On appeal, the learned Sessions Judge, while agreeing with the learned Magistrate so far as Inderjit was concerned, although he reduced the sentence from nine months to six months, remitting the fine altogether, disagreed with him so far as Anangpal and Bijaipal were concerned. These two he found not guilty. Inderjit has come to this Court in revision.

[7] The judgment of the learned Magistrate, Mr. Jagram Singh, reads from end to end as a sort of special pleading. He has wound it up by giving a testimonial to Sardar Bashir Ahmad Khan :



"The credit of this magnificent work goes to Sardar Bashir Ahmad Khan the then Sub-Divisional Magistrate, Anupshahr, at whose initiative the unlicensed arms and ammunitions have been recovered from the house of the accused. I cannot suggest any reward to this Gazetted Officer in view of his position. However, I would bring to the notice of the authorities to recognise his services in this connection. The P. I. M. Abdul Hafiz Khan also deserves credit for the excellent and independent way in which he has conducted this case."

[8] It requires an effort of imagination how the learned Magistrate comes to regard the conduct of Bashir Ahmad Khan as anything but deserving of condemnation. The judgment of the learned Sessions Judge is itself replete with remarks which show that Sardar Bahsir Ahmad Khan, in the course of the enquiry, conducted himself in a manner which, to say the least, reflects discredit upon him. I shall let the learned Sessions Judge speak for himself when I go in further detail.

[9] Before addressing myself to this aspect of the matter, I propose to come to closer quarters with the facts. The raid was made by a party under the leadership of Mr. Bashir Ahmad Khan, assisted by the two police inspectors, Badrul Hasan and Nisar Ahmad Zobairi. Section 103, Criminal P. C., cast an obligation upon Mr. Bashir Ahmad Khan to associate with himself, "two or more respectable inhabitants of the locality", before undertaking or executing the search. The importance of this provision of law was emphasised in A. I. R. 1934 ALL. 374.<sup>1</sup> Says Niamatullah J :

"Where respectable persons can be found in the neighbourhood, and the police officer making a search takes with him persons whose respectability is questionable or who come from a distant locality the inference is that he was prompted by a desire to have such witnesses as would be easily persuaded to support any story which he might put forward."

In A. I. R. 1935 ALL. 520<sup>2</sup> Mr. Justice Bennet went so far as to hold that the conviction in the absence of such witnesses, could not be sustained.

[10] Both Munshi Khan and Hemraj Singh have been condemned by the learned Sessions Judge himself. Neither belongs to the locality. Hemraj, besides being a stranger, is also condemned by him on other grounds. There are two rival parties, one headed by Roshan Singh and the other by Inderjit. The relations between the two are strained. Hemraj belongs to the party of Roshan. Summing up his opinion about him the learned Sessions Judge says :

"This Hemraj Singh was challaned with Roshan Singh in the aforementioned criminal case under S. 107, Criminal P. C. Thus Hemraj Singh is not a disinterested person, though he may be respectable in that he pays land revenue to the extent of Rs. 250."

On this finding, the applicant is entitled to say that, the mandatory provisions of S. 103, Criminal P. C. not having been complied with

the prosecution is unsustainable. The learned Crown counsel, however, contends that this provision is not mandatory. The law requires that the officer in charge of the search should make honest efforts to secure the presence of respectable witnesses of the locality, but the search will not be vitiated if no such witness is available. There is no finding by the learned Judge that any attempt was made by Sardar Bashir Ahmad Khan to secure such witnesses and I am disposed to accede to the contention of the learned counsel for the defence that the search was not a good search and the necessary foundation for a successful prosecution had not been laid.

[11] But in this case the defence is on surer ground. The learned Sessions Judge says that there is the evidence of Bashir Ahmad Khan, Nisar Ahmad Zobairi and Badrul Hasan. If the evidence of the last two named is supported by the evidence of Sardar Bashir Khan, the Magistrate, it will be enough for the purposes of the prosecution. I have thus to see whether the evidence of Sardar Bashir Ahmad Khan is of such a character. His official position no doubt raises in his favour a presumption of veracity. But the learned Sessions Judge himself, on a consideration of the entire materials, came to the conclusion that the conduct of Bashir Ahmad Khan left a great deal to be desired. A few quotations, out of a large number, from the judgment itself will be enough to prove the character of this man :

"(a) The only inference from this conduct of Mr. Bashir Ahmad Khan can be that he is intentionally withholding facts, so that his connections with the war fund collections may not be established."

"(b) This would mean that the Deputy Magistrate is giving a wrong statement. . . . ."

[12] It is surprising how the learned Sessions Judge upheld the conviction of the applicant on the testimony of a man of the character of Sardar Bashir Ahmad Khan. It appears to me that the accused is right when he said that the cause of his misfortune was either his reluctance to comply at all with the demands of the magistracy for contributions towards the war loans, or his inability to contribute as much as they wanted. The learned Sessions Judge himself says that :

"From the above facts, it is amply clear that the then magistracy of Bulandshahr district was keen not only to secure the conviction of the four accused persons but also to harass them to the maximum."

It is useless to multiply instances.

[13] This case bears a family likeness to the case in 18 I. C. 149.<sup>3</sup> That was a case under S. 110 of the Code of Criminal Procedure. The person involved there was a highly respectable zamindar in the district of Bhagalpur in Bihar. He somehow incurred the displeasure of the



district authorities and fell a victim to it. The applicant before me, for reasons fully discussed by the learned Sessions Judge, displeased the district authorities and his misfortune is the result of that displeasure.

[14] I, therefore, allow this application, set aside the conviction and sentence and acquit the applicant. He is on bail and need not surrender. Before parting with the case, I deem it my duty to say that this was a prosecution which should never have been initiated and, at all events, should not have been allowed to be disfigured by methods so dubious and by evidence of such a questionable character. It is never the purpose of the law that a prosecution should degenerate into a persecution.

[15] In fairness, however, to the persons immediately in charge of the prosecution, I feel bound to say that, on a careful examination of the whole case, the impression left on my mind is that although they, or at least some of them, were highly placed and important members of the official hierarchy, the entire blame does not rest on them. It must be shared by people in the district, more highly placed than they and more important members of that hierarchy.

[16] In A.I.R. 1935 ALL. 520,<sup>2</sup> Bennet J. following an earlier decision of this Court, in Cri. Appeal No. 285 of 1934,<sup>3</sup> directed that a copy of the judgment should be sent to the Inspector General of Police for such action, if any, as he desired to take. Following the above precedent, I direct that copies of the judgment of the learned Sessions Judge as also of this Court be sent to the Provincial Government.

K.S.

*Conviction set aside.*

**A. I. R. (34) 1947 Allahabad 168 [C. N. 76]**  
SINHA AND MANSUR ALAM JJ.

*Jahangir — Defendant — Appellant v. Jinardhan and others—Respondents.*

First Appeal No. 168 of 1945, De'd on 16-8-1946, from order of Dist. Judge, Meerut, D/- 21-3-1945.

Civil P. C. (1908), S. 11 — Decree against father or manager of joint Hindu family—Minor sons not impleaded — Subsequent suit by sons challenging decree on ground of fraud or collusion—Defendant raising plea of *res judicata*—Sons held were bound by decree in absence of proof of fraud or collusion as they must be deemed to have been properly represented in previous suit.

A decree obtained against a father or karta of a joint Hindu family is binding on the sons as the father must be held to have represented not only his own interest but also the interest of the other members of the joint family : 14 A. I. R. 1927 P. C. 56 and 26 A. I. R. 1939 All. 399 (FB), *Rel. on.* [Para 3]

Consequently a decree passed against a father or a manager of a joint Hindu family must be held to be *res judicata* against the other members of the family unless it is vitiated by fraud or unless the son establishes that his interests were not properly safeguarded. The fact that

the sons were no parties to the earlier suit in which the decree against the father was passed will not affect the question as S. 11 is not exhaustive of the principle of *res judicata* : 8 A. I. R. 1921 P. C. 11 and 9 A. I. R. 1922 P. C. 80, *Rel. on.* [Paras 4 and 5]

A brought a suit for possession of certain property against B and his two brothers and uncle constituting a joint Hindu family and a decree was passed in A's favour. Subsequently B's minor sons brought a suit for possession on the ground that the decree in the previous suit was the result of collusion between A and B and, therefore, B could not be said to have adequately represented the interest of his minor sons. Defendant A raised the plea of *res judicata*. The Court framed an issue on the question of *res judicata* but the parties stated that they did not want to produce any evidence on the issue. The Court, therefore, found the issue in A's favour and held that the decree in previous suit operated as *res judicata*. In appeal the case was remanded on the ground that a separate issue on the question of fraud and collusion should have been framed :

*Held* that the Court was right in not framing a separate issue about the alleged fraud. That issue was clearly involved in the issue of *res judicata* and it was for the plaintiffs to have led evidence in proof of their case that the decree in the earlier suit was vitiated by fraud and collusion or their interests were not properly safeguarded in the previous suit. The plaintiffs having failed to adduce evidence on the issue of *res judicata* they were bound by the decree in the previous suit. [Para 7]

Civil P. C.—('44-Com.) S. 11, N. 61, Pts. 1 and 4; N. 98, Pts. 2 and 3.

Shambhu Prasad — for Appellant.

S. B. L. Gour — for Respondents.

Cases referred :—

1. ('27) 51 Bom. 450 : 14 A. I. R. 1927 P. C. 56 : 54 I. A. 122 : 101 I. C. 44, Lingangowda v. Basangowda.
2. ('39) 1939 A. L. J. 450 : 26 A. I. R. 1939 All. 399 : I. L. R. (1939) All. 602 : 183 I. C. 434 (F.B.), Thakur Din v. Sita Ram.
3. ('21) 19 A. L. J. 366 : 8 A. I. R. 1921 P. C. 11 : 48 Cal. 499 : 48 I. A. 187 : 60 I. C. 631 (P.C.), G. H. Hook v. Administrator General of Bengal.
4. ('22) 20 A. L. J. 684 : 9 A. I. R. 1922 P. C. 80 : 45 Mad. 320 : 49 I. A. 129 : 67 I. C. 408 (P.C.), Rama Chandra Rao v. Rama Chandra Rao.

**Mansur Alam J.**—The facts leading up to the filing of the suit out of which this appeal arises are that in 1939 a suit No. 157 of 1939, was filed by defendant 1 against Munshi, his two brothers and his uncle for possession of the property in dispute. That suit was hotly contested right up to the High Court and was decreed by all the Courts.

[2] The plaintiffs, who are the sons of Munshi and are minors, brought the present suit with their mother as their next friend for possession on the allegation that the decree in the earlier suit was the result of fraud and collusion between father and defendant 1 and, therefore, the father could not be said to have adequately represented the interest of the sons and hence they were not bound by the decree in that suit. The suit was contested and the learned Munsif framed three issues, one of



which was about the plea of *res judicata* raised by the defendant. The learned Munsif took up the case for decision on the question of *res judicata* first and the counsel for the parties made a statement that they would produce no evidence on that issue. The learned Munsif ultimately gave a finding to the effect that the plaintiffs were adequately represented by their father Munshi in the previous suit and, therefore, their claim was barred by *res judicata*. Against this decision, the plaintiffs went in appeal to the lower appellate Court which took the view that the learned Munsif should have struck a separate issue about fraud and collusion on the ground of which the decree in suit No. 157 of 1939 was challenged and, this not having been done, it remanded the case to the learned Munsif with direction that he should frame the issue about fraud and then decide the question. The defendant has come in appeal to this Court against the order of remand. It is urged that the plaintiffs themselves having agreed to produce no evidence on the issue about *res judicata*, they have to thank themselves for the situation that they find themselves in. It seems to us that there is considerable force in this contention.

[3] It is now the settled view both of their Lordships of the Judicial Committee in 51 Bom. 450<sup>1</sup> and also of a Full Bench of this Court in 1939 A. L. J. 450<sup>2</sup> that a decree obtained against a father or karta of a joint Hindu family must be binding on the sons and the father must be held to have represented not only his own interest but also the interest of the other members of the joint family. In the course of their judgment in the case mentioned above their Lordships of the Judicial Committee made the following observation :

"In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he becomes of age, and then bring an action, or bring an action by his guardian before; and in each of these cases, therefore; the Court looks to the Explan. 6 of S. 11, Civil P. C., to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors."

[4] It, therefore, follows that a decree passed against a father or a manager of a Hindu family—unless it is vitiated by fraud or unless the son establishes that his interests were not properly safeguarded—must be held to be *res judicata* against the other members of the family.

[5] It is, however, contended on behalf of the respondent that there can be no question of *res judicata* in this case because the plaintiffs were no parties to the earlier suit. We have again the high authority of their Lordships of

the Privy Council in 19 A. L. J. 366<sup>3</sup> that S. 11, Civil P. C. is not exhaustive of the principle of *res judicata*. In 20 A. L. J. 684<sup>4</sup> at p. 691, again a Privy Council case, their Lordships are more explicit and observe that

"the principle which prevents the same case being twice litigated, is of general application and is not limited by specific words of the Code in this respect." This contention, therefore, has no force.

[6] Now, it cannot be seriously disputed that before a decision can operate as *res judicata*, it must not be tainted with fraud or any other legal flaw. When, therefore, the defendant raised the plea of *res judicata*, he meant to plead that the decree was not a tainted decree and was passed in a suit in which the plaintiffs were properly represented and their interests were adequately safeguarded and the only manner in which they could get rid of the effect of such a decree was by establishing that the decree was not a good decree because it was either tainted or they were not properly represented in the suit.

[7] The parties to this case could not have been in any doubt about this, and it seems to us that the learned Munsif was right in not framing a separate issue about the alleged fraud. That issue was clearly involved in the issue of *res judicata* and it was for the plaintiffs to have led evidence in proof of their case that the decree in the earlier suit was vitiated by fraud and collusion. They chose not to do so and have to thank themselves for the position they find themselves in. The decree in the earlier suit is, therefore, clearly binding on the plaintiffs.

[8] In this view of the matter, we must allow this appeal, set aside the order of remand passed by the lower appellate Court and restore the decree passed by the learned Munsif. In the circumstances of the case we make no order as to costs.

K.S.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 169 [C. N. 77.]**  
SANKER SARAN AND RAGHUBAR DAYAL JJ.

*Kunj Behari — Applicant v. Emperor.*

Criminal Revn. No. 274 of 1946, Decided on 14-10-1946, from order of Sessions Judge, Allahabad.

Criminal P. C. (1898), S. 415 — No appeal allowed in cases coming under S. 413 unless aggregate sentence of imprisonment exceeds one month or sentence of fine exceeds Rs. 50.

In cases which would come under S. 413, Criminal P. C. an appeal would be allowed under S. 415 in which a sentence of fine and a sentence of imprisonment or any sentence other than a sentence of fine are also passed. In cases which come under S. 414, an appeal would be allowed under S. 415 if the sentence of fine is combined with any other sentence. No appeal would be allowed under S. 415 in cases which otherwise come under S. 413 unless the aggregate sentence of imprisonment exceeds one month in the case of a sen-



tence passed by a Court of session or a sentence of fine exceeding Rs. 50 is passed in case of such fine being imposed by the Court of session or the District Magistrate or other Magistrate of the first class. [Para 2]

Cr. P. C.—('46-Com.) S. 415, N. 1, Pt. 5.

P. C. Chaturvedi — for Applicant.

Deputy Government Advocate — for the Crown.

Cases referred :—

1. ('37) 24 A. I. R. 1937 Oudh 524 : 13 Luck. 618 : 171 I. C. 337, Makrand Singh v. Ganga.
2. ('42) I. L. R. (1942) All. 665 : 29 A. I. R. 1942 All. 336 : 200 I. C. 768, Emperor v. Gorakh Prasad.
3. ('43) 30 A. I. R. 1943 All. 18 : I. L. R. (1942) All. 947 : 204 I. C. 310, Lalji v. Emperor.

**Raghubar Dayal J.**—Kunj Bihari was convicted by a Magistrate, first class, on two counts under S. 379 I. P. C. for having stolen bricks from the brick kiln belonging to Mata Prasad and Nazir. He was sentenced to a fine of Rs. 25, on each count. He went to the Sessions Court and described his application both as a criminal appeal and revision. It seems to have been treated as a criminal revision by the Sessions Judge who after hearing the parties, rejected it. Kunj Bihari has filed this revision in this Court.

[2] This revision was referred to a Bench on account of difference between this Court and the Oudh Chief Court on the question whether, in such circumstances, an appeal lay to the Sessions Judge or a revision lay. The reasons for the views of the two Courts are to be found in A. I. R. 1937 Oudh 524<sup>1</sup> and in I. L. R. (1942) ALL. 665.<sup>2</sup> The Allahabad view that no appeal lay when a person is sentenced to two different punishments of the same kind for two offences unless the aggregate of the punishments justified an appeal was repeated in A. I. R. 1943 ALL. 18.<sup>3</sup> It is not necessary to go into those reasons again in view of the amendment made in S. 415. The difference in the two views arose on account of the non-amendment of S. 415, Criminal P. C., simultaneously with the amendments of ss. 413 and 414, Criminal P. C. As a result of the amendment made in S. 415, Criminal P. C., this section now reads as follows :

"An appeal may be brought against any sentence referred to in S. 413 or S. 414 by which any punishment therein mentioned is combined with any other punishment but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace."

It is clear now that an appeal is allowed under S. 415 if any punishment mentioned in either S. 413 or S. 414 is combined with any other punishment. In other words, in cases which would come under S. 413, Criminal P. C. an appeal would be allowed under S. 415 in which a sentence of fine and a sentence of imprisonment or any sentence other than a sentence of fine are also passed. In cases which come under

S. 414, an appeal would be allowed under S. 415 if the sentence of fine is combined with any other sentence. No appeal would be allowed under S. 415 in cases which otherwise come under S. 413 unless the aggregate sentence of imprisonment exceeds one month in the case of a sentence passed by a Court of session or a sentence of fine exceeding Rs. 50, is passed in case of such fine being imposed by the Court of session or the District Magistrate or other Magistrate of the first class. An appeal would be allowed under S. 415 against orders passed in a summary trial if the aggregate sentence of fine exceeds Rs. 200. This was the view about S. 415 prior to the amendment in 1923 and is the view which was taken by this Court in its earlier cases. Any other view would, in some cases, go against the provisions of S. 35 (3), Criminal P. C. If two sentences of imprisonment totalling less than a month are passed by a Court of session an appeal would not be allowable in view of the provisions of S. 35 (3), Criminal P. C., as it provides that for purposes of appeal consecutive sentences will be deemed to be one sentence. According to the contrary view urged before us an appeal in such cases would be allowable under S. 415, Criminal P. C., if that view be accepted. Such could not possibly be the interpretation of S. 415, Criminal P. C. We, therefore, hold that the order passed on the applicant by the Magistrate, first class, is not appealable as he was sentenced to two separate sentences of fine of Rs. 25 each.

[3] The learned counsel for the applicant urged that the conviction of the applicant was not correct on merits. Ordinarily facts are not to be gone into in revision. We do not see any particular reason to depart from this view. We cursorily went through the facts and are of opinion that the allegation of the accused that he had removed the bricks with the permission of Nazir, one of the partners is not substantiated. Nazir was not examined in defence and when examined as a Court witness, did not support this contention. There is nothing on the record to indicate that Nazir and Mata Prasad had fallen out when this complaint was lodged and that they had made up their differences by the time Nazir was examined in Court. We, therefore, reject this application.

G.B.

*Application rejected.*

**A. I. R. (34) 1947 Allahabad 170 [C. N. 78.]**

MOOTHAM J.

*Chief Inspector of Stamps — Applicant v. Mt. Ram Kali Devi — Opposite Party.*

Civil Revn. Appln. No. 434 of 1945, Decided on 6-9-1946, against order of Sm. C. C. Judge, Allahabad, D/- 16-3-1945.



**Court-fees Act (1870), S. 7 (xi) (cc) — Appeal — Court-fee — Suit for possession against tenant — Decree — Appeal — Court-fee must be computed as on plaint in suit.**

As a consequence of the word "suit" being defined in Clause (iv) of S. 2 of the Act as including a first or second appeal from a decree in a suit, the court-fee payable in respect of an appeal arising out of a suit for possession against a tenant must be computed in the same manner as on the plaint in the suit in which the decree was passed : 28 A. I. R. 1941 All. 357, *Foll.*; 33 A. I. R. 1946 All. 303, *Ref.* [Para 6]

**Court-fees Act — ('44-Com.) S. 7 (Gen.), N. 9.**

*Brijlal Gupta* — for Applicant.

*Mukhtar Ahmad* — for Opposite Party.

**Cases referred :—**

1. ('41) 1941 A. L. J. 409 : 28 A. I. R. 1941 All. 357 : I. L. R. (1941) All. 469 : 197 I. C. 582, *Abdul Haq v. Shamsuddin.*
2. ('46) 1946 A. L. J. 43 : 33 A. I. R. 1946 All. 303 : I. L. R. (1946) All. 359 : 222 I. C. 616, *Kishen Lal v. Preduman Kishen Singh.*

**Order.** — This is an application by the Chief Inspector of Stamps for revision, under S. 6B, Court-fees Act, 1870, as amended in its application to the United Provinces (hereinafter referred to as 'the Act'), of an order of the learned Small Cause Court Judge of Allahabad in Civil Appeal No. 301 of 1944, dated 16.3.1945.

[2] The facts giving rise to this application are briefly as follows. On 1.11.1939, Mt. Ram Kali Devi executed in favour of Pandit Niranjana Lal Bhargava a lease of a building for a term of four years at a monthly rental of Rs. 220. On the expiry of the lease, the tenant failed to give vacant possession and the landlord accordingly filed a suit in the Court of the Munsif of Allahabad for possession of the demised property and for certain other reliefs with which we are not now concerned. A court-fee of Rs. 259.6.0 was paid by the plaintiff, this being admittedly the correct fee payable under cl. (cc) of sub-s. (xi) of S. 7 of the Act.

[3] At the trial of the suit, it was contended by the tenant that, as a consequence of an order made by the District Magistrate under sub-r. (4) of R. 81, Defence of India Rules, the plaintiff was not entitled to possession. This submission found favour with the learned Munsif who, by a judgment dated 5-7-1944, gave the plaintiff a decree for ejectment, but directed *inter alia* that the decree should remain suspended for such time as the aforesaid order of the District Magistrate remained in force. With this decree the plaintiff was dissatisfied, and she accordingly filed an appeal in which she challenged so much of the order of the lower Court as prevented her from obtaining immediate possession of the property. Her contention was that the condition or proviso which was attached by the learned Munsif to the decree for ejectment was illegal, and that the decree should be modified accordingly.

[4] Upon her memorandum of appeal, the plaintiff-appellant paid a court-fee of Rs. 18.12.0 being the amount which was payable if the appeal was one to which cl. (iii) of item 17 of Sch. 2 to the Act applied, and it is with regard to the amount of this fee that the present application has arisen.

[5] It is contended on behalf of the applicant that in a case such as the present the court-fee payable on the memorandum of appeal is the same as that which is payable upon the original plaint, and this it is said must be so upon a proper construction of the provisions of S. 7 of the Act read with the definition of the word 'suit' in S. 2 of the Act.

[6] In my opinion this contention must prevail, the matter being concluded by authority. In 1941 A. L. J. 409<sup>1</sup> it was held that as a consequence of the word 'suit' being now defined in cl. (iv) of S. 2 of the Act as including a first or second appeal from a decree in a suit, the court-fee payable in respect of an appeal arising out of a suit against a mortgagee for recovery of the property mortgaged must be calculated according to the principal money expressed to be secured by the instrument of mortgage; that is to say, it must be computed in the same manner as on the plaint in the suit in which the decree was passed. 1941 A. L. J. 409<sup>1</sup> was considered and approved in 1946 A. L. J. 43<sup>2</sup> a decision of a Bench of this Court, and while both cases deal with the court-fee payable on the memorandum of appeal in suits which fall under sub-s. (ix) of S. 7 of the Act, I can see no distinction in principle between such cases and those which fall (as does the original suit in this case) under sub-s. (xi) of the same section.

[7] I am therefore of opinion that this application must be allowed, with costs; and under sub-s. (ii) of S. 6B of the Act I declare that the proper court-fee has not been paid on the memorandum of appeal and that the amount of deficiency in court-fees is Rs. 240.10.0.

V.R.

*Application allowed.*

**A. I. R. (34) 1947 Allahabad 171 [C. N. 79.]**  
MALIK J.

*Mt. Ram Sri v. Jai Lal.*

Second Appeal No. 1520 of 1945, Decided on 1-5-1946, from order of Addl. Civil Judge, Etah, D/- 3-4-1945.

Civil P. C. (1908), O. 21, R. 94 — Confirmation of sale, and not issue of sale certificate, passes title to auction purchaser.

The certificate of sale is no doubt a document of title but the vesting of title in the auction-purchaser is not made dependent on the issue of sale certificate. It is the confirmation of the sale that passes title to the auction purchaser : 9 A.I.R. 1922 P. C. 252, *Ref.* [Para 2]

C. P. C. — ('44-Com.) O. 21, R. 94, N. 3.

*M. L. Chaturvedi* — for Appellants.

*R. N. Verma* — for Respondents.



*Case referred:—*

1. (21) 48 I. A. 155 : 9 A. I. R. 1922 P. C. 252 : Mad. 483 : 63 I. C. 708 (P. C.), Ramabhadra Naidu v. Kadiriyasami Naicker.

**Judgment.** — This case raised a very short point. Certain trees were sold at auction in execution of a simple money decree and were purchased by the plaintiff in the year 1934. The sale was made absolute on 31-7-1934. Six years afterwards in the year 1940, in execution of a decree against the same judgment-debtors the defendants purported to sell the same trees and purchased them themselves. They then started interfering with the plaintiff's title and the plaintiff then filed the suit for delivery of possession and for damages. The suit was decreed by the lower appellate Court.

[2] Learned counsel for the appellants has raised the point that it was clear from the judgment of the trial Court that though the sale was confirmed on 31-7-1934, the plaintiff did not apply for a sale certificate and he has urged that without a sale certificate the title in the trees did not pass to the plaintiff. Learned counsel has relied on the decision of their Lordships of the Judicial Committee in 48 I. A. 155<sup>1</sup> in which it was held that a certificate of sale was a document of title. It is no doubt a document of title and the rules make it perfectly clear that this is to be treated as such and then sent to the various registration offices where the property may be situate with the object of having a note made in the necessary registers, but that does not, however, settle the question whether the title to the property can or cannot pass till the issue of the sale certificate. Under O. 21, R. 92, Civil P. C., where no application is made under R. 89, R. 90 or 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute. Under S. 65 of the Code where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. These sections make it perfectly clear that it is the confirmation of the sale that passes the title and the auction purchaser becomes the owner of the property from the date of the sale. Under O. 21, R. 94, Civil P. C., it is the duty of the Court to grant a certificate specifying the property sold and the name of the person who at the time of the sale is declared to be the purchaser, but such certificate shall bear date the day on which the sale became absolute. The vesting of title is not made dependant on the issue of the sale certificate. To my mind, the

law on the point is perfectly clear that the property vested in the plaintiff after the auction sale was confirmed from the date of the said sale and there was therefore no title left in the judgment-debtor which the defendants could purchase in the year 1940. The decision of the lower appellate Court is, therefore, correct and I dismiss this appeal with costs.

W.N.G.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 172 [C. N. 80.]**

**MANSUR ALAM J.**

*Kalicharan Sainthwar and others—Defendants — Appellants v. B. Banka Chand and others — Plaintiffs—Respondents.*

Second Appeal No. 528 of 1944, Decided on 15-8-1946, from order of Addl. Civil Judge, Gorakhpur, D/-14-1-1943.

Limitation Act (1908), Art. 181—Appellate decree reversing that of lower Court confirmed in Letters Patent appeal—Limitation for restitution under S. 144, Civil P. C. runs from date of appellate decree and not from date of decree in Letters Patent appeal: 21 A.I.R. 1934 All. 626 (F. B.) and 28 A. I. R. 1941 All. 28, *Foll.* [Para 3]

Lim. Act. — ('42 Com.) Art. 181, N. 7, Pt. 7.

*Sri Narain Sahai*—for Appellants.

*Shambhu Prasad*—for Respondents.

*Cases referred:—*

1. ('34) 1934 A. L. J. 503 : 21 A. I. R. 1934 All. 626 : 57 All. 26 : 150 I. C. 1096 (F. B.), Parmeshar Singh v. Sitladi Dube.  
2. ('41) 28 A. I. R. 1941 All. 28 : 193 I. C. 387, Ujagar Singh v. Likha Singh.

**Judgment.**—This is a defendants' appeal arising out of an application for restitution under S. 144, C. P. C. It appears that the respondents to this appeal filed a suit in the Court of the Munsif for joint possession which was dismissed on 2-4-1932. On appeal the lower appellate Court reversed the decision of the Munsif and decreed the suit on 14-12-1933. While a second appeal was pending in the High Court, the plaintiff respondents in execution of their decree obtained possession on 3-5-1934. The second appeal was heard by a learned Single Judge of this Court who on 20-10-1936 reversed the decision of the lower appellate Court and restored that of the first Court dismissing the suit. Against the decision of the learned Single Judge an appeal under Letters Patent was filed and on 28-10-1938, the Letters Patent Bench affirmed the decision of the learned Single Judge dismissing the suit.

[2] The present application out of which this second appeal arises was filed on 2-6-1941 for restitution under S. 144. The application was contested on the ground that it was barred by time but the learned Munsif repelled the plea and allowed the application for restitution, holding that time began to run from the date of the decree of the Letters Patent Bench and,



therefore, the right to apply under S. 144 accrued only after the decision was affirmed by the Letters Patent Bench. On appeal the lower appellate Court took a contrary view and held that the affirmance of the decree by the Letters Patent Bench did not give a fresh start to the period of limitation and the application was barred by time. The defendants have now come up in second appeal to this Court.

[3] It seems to me that the questions raised in this appeal are concluded by the majority decision in a Full Bench case of this Court in 1934 A. L. J. 503<sup>1</sup> in which two learned Judges took the view that where the appellate decree merely affirms the decision appealed from, it would not give a fresh start of limitation and that time would begin to run from the date of the first decree. Latterly a similar point arose in another case, A.I.R. 1941 ALL. 28<sup>2</sup>, in which another learned Judge of this Court has taken the same view as was taken by the majority of Judges of the Full Bench. With both these views I respectfully agree. In this view of the matter, there is no force in this appeal and it is dismissed with costs.

K.S.

*Appeal dismissed.*

A. I. R. (34) 1947 Allahabad 173 [C. N. 81.]

YORKE J.

*Emperor v. Rasul Ahmad — Applicant.*

Criminal Ref. No. 376 of 1946, Decided on 16-10-1946, made by Sessions Judge, Saharanpur, D/- 9-2-1946.

(a) Criminal P. C. (1898), S. 476-B—Appeal under S. 476 cannot be transferred by District Judge to Civil Judge — Civil Judge cannot make complaint under S. 476-B.

A Civil Judge is not competent to make a complaint under S. 476-B because an appeal from an order under S. 476 either making a complaint or refusing to make a complaint may not be transferred by the District Judge to the Court of the Civil Judge but must be disposed of by the District Judge himself, such a proceeding being of a quasi-criminal nature. [Para 2]

Cr. P. C.—('46-Com.) S. 476-B, N. 6, Pt. 4.

(b) Criminal P. C. (1898), S. 195 (1) (b), (c)—Claim on forged document dismissed by Civil Court—Scribe of such forged document is not party to Civil proceedings—Complaint by Court against him is not necessary.

Where a plaintiff's claim founded on a document is dismissed by the Civil Court and an application is made by the defendant for the prosecution of a person under S. 467, Penal Code as being the scribe of a forged document no complaint by a Court against him is required by the provisions of S. 195 (1) (b) or (c) inasmuch as he is not a party to the proceeding in the Civil Court and a complaint can be made against him under the provisions of S. 190 (1) (a). [Para 3]

Cr. P. C.—('46-Com.) S. 195, N. 12, Pt. 1.

(c) Criminal P. C. (1898), S. 190 (a) — Magistrate can take cognizance of offence on complaint by Judge based on facts obtained in a case tried by him without jurisdiction.

Section 190 does not prevent the Magistrate from taking cognizance of an offence on a complaint made by a Judge who in the course of the performance of his duties, even in a case in which according to law he had no jurisdiction though under a mistaken view of the law he was supposed to have jurisdiction, comes to know of certain facts which lead him to the conclusion that an offence has been committed : 25 A. I. R. 1938 All. 449, *Rel. on* ; 23 A.I.R. 1936 P. C. 253, *Ref.*

[Para 4]

Cr. P. C. — ('46-Com.) S. 190, N. 19, Pt. 11; N. 23, Pt. 14.

Deputy Government Advocate — for the Crown.

B. S. Darbari — for Applicant.

M. A. Kazmi — for Opposite party.

Cases referred :—

1. ('36) 1936 A. L. J. 895 : 23 A.I.R. 1936 P. C. 253 : 17 Lah. 629 : 63 I. A. 372 : 163 I. C. 881 (P. C.), *Nazir Ahmad v. Emperor.*
2. ('38) 25 A. I. R. 1938 All. 449 : 176 I.C. 960, *Tara Singh v. Emperor.*

**Order.**—I have heard Mr. Kazmi in support of this reference and Mr. Darbari against it. The Sessions Judge of Saharanpur recommends that the commitment for trial of Rasul Ahmad on charges under Ss. 467 and 193, Penal Code be quashed.

[2] As regards the commitment for trial on the charge under S. 193, Penal Code, it is not disputed that the learned Civil Judge, who, acting under S. 476B, Criminal P. C., made the complaint, was not competent so to do because it has been held that an appeal from an order under S. 476 either making a complaint or refusing to make a complaint may not be transferred by the District Judge to the Court of the Civil Judge but must be disposed of by the District Judge himself, such a proceeding being of a quasi-criminal nature.

[3] As regards the complaint under S. 467, the position is slightly different. The complaint against Rasul Ahmad was that he was the scribe of a document which was a forged document and which was used in a civil proceeding by Mohammad Ayub. Mohammad Ayub's claim founded on this document was rejected and an application was made by the defendant, Akbar Ali, for the prosecution of both, Mohammad Ayub and Rasul Ahmad, in respect of this document. The application was rejected by the Munsif and an appeal was lodged in the Court of the District Judge who erroneously transferred it for disposal to the first Civil Judge. The first Civil Judge proceeded to make a complaint against Rasul Ahmad under both sections that is 193 and 467, Penal Code. The complaint under S. 193 was evidently a bad complaint for the reason that the Civil Judge had no jurisdiction to entertain the appeal and to make the complaint. But in the case of the charge under S. 467, inasmuch as Rasul Ahmad was not a party to the proceeding in the Court but was



only alleged to have scribed and thus to have forged the document, no complaint by a Court against him was required by the provisions of S. 195 (1) (b) or (c), Criminal P. C., and a complaint could be made against him under the provisions of S. 190 (1) (a) of the Code. The learned Sessions Judge is of opinion that it was necessary for the taking of cognizance of the offence under S. 467, Penal Code against the accused that there should have been a private complaint or a police report before the Magistrate. The word "private" of course does not find a place in S. 190, Criminal P. C. He went on to remark that

"the complaint filed by the first Civil Judge cannot be treated as a complaint by a private individual. The act of the Court must be taken to be in the exercise of the powers vested in it and must be performed strictly according to law. If any act of the Court is invalid as an act of a Court, it cannot be deemed to be a private act of the presiding officer. This appears to follow from the principle behind the decision of their Lordships of the Privy Council in 1936 A. L. J. 895."

The only portion of the head-note and indeed of the decision which is said to be applicable is that in which it is said that

"The rule that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily forbidden, applies to S. 164, Criminal P. C."

[4] The contention of Mr. Kazmi is that the first Civil Judge was sitting as a Court and not as Mr. X, Civil Judge, and that the only complaints which he could make in the circumstances were complaints such as would fall within the scope of S. 195 (1) (b) or (c). He further contends that the Civil Judge in the circumstances in which he was actually sitting had no jurisdiction to make any sort of complaint. Mr. Darbari, on the other hand, contends that it does not matter how the civil Judge came to be acquainted with the facts, nor does it matter by what process or in what form he chose to make the complaint to the magistrate about the offences which seemed to him to arise from the facts which came to his knowledge. He has referred to a reported case of my brother Allsop J., A. I. R. 1938 ALL. 449.<sup>2</sup> The head-note in that case runs as follows :

"There is nothing in S. 190 which prevents a Sub-divisional Magistrate from taking cognizance of an offence that happens to be reported to him by a Civil Judge or an officer who presides in a Court of justice. The Civil Judge being a complainant, it is not necessary that he should be examined before the Magistrate takes cognizance of the offence. However, even if he should be examined and is not examined, that would amount only to an irregularity which would not vitiate the whole trial."

In that case the offence was brought to the notice of the sub-divisional Magistrate by a Civil Judge who had issued an order of attachment in contravention of which a defendant had removed

certain crops. It does not seem to me that there is any real distinction in principle between such a complaint and a complaint such as we have in the present case made by a Judge who in the course of the performance of his duties, even in a case in which according to law he had no jurisdiction though under a mistaken view of the law he was supposed to have jurisdiction, comes to know of certain facts which lead him to the conclusion that an offence has been committed. In such circumstances, the Civil Judge, so far as I am able to see, was in no way debarred from making a complaint of the facts which constituted such offence and if he made a complaint, it was the duty of the Sub-divisional Magistrate to entertain that complaint. The mere fact that he purported to make the complaint in the capacity of a Court would not, I think, debar the Magistrate from taking cognizance of the offence alleged. In these circumstances, so far as relates to the charge under S. 467, I reject the reference and direct the learned Sessions Judge to proceed to dispose of the Sessions trial according to law.

D.H.

*Reference rejected.*

### A. I. R. (34) 1947 Allahabad 174 [C. N. 82.]

IQBAL AHMAD C. J. AND BIND BASNI

PRASAD J.

*Firm Rambux Nath Mal — Attaching Decree-holder—Appellant v. Firm Mansaram Murlidhar — Objector-judgment-debtor — Respondent.*

Ex. First Appeal No. 583 of 1944, Decided on 2-5-1946, from decision of Civil and Sessions Judge, Cawnpore, D/- 14-8-1944.

Civil P. C. (1908), O. 21, R. 53 (3) — Attachment of money decree — Attaching decree-holder can execute that decree for as long as holder of attached decree can, even though limitation for his own decree has expired — Civil P. C. (1908), S. 48.

Where an application for the execution of a decree has been made within the statutory period of limitation by the attachment of a money decree, the attaching decree-holder possesses all the rights which the decree-holder of the attached decree possesses and an application for the execution of the attached decree can be made even after the expiry of the statutory period of limitation under S. 48 for the execution of the decree in which such attachment is made, provided there is limitation for the latter : 22 A. I. R. 1935 Lah. 508, 34 All. 396 and 13 A. I. R. 1926 All. 660, *Disting.*

[Paras 10 and 12]

C. P. C. —

(44-Com.) S. 48, N. 6; O. 21, R. 53, N. 10.

S. N. Seth — for Appellant.

L. N. Gupta — for Respondent.

Cases referred :—

1. (35) 22 A. I. R. 1935 Lah. 508 : 17 Lah. 13 : 158 I. C. 127, *Devi Das v. Mahomed Akbar Khan*.
2. (12) 9 A. L. J. 365 : 34 All. 396 : 14 I. C. 172, *Khetpal Singh v. Tikam Singh*.
3. (26) 13 A. I. R. 1926 All. 660 : 95 I. C. 26, *Sakla Chandhari v. Harbansdeo Rai*.

**Bind Basni Prasad J.** — This is an appeal from an order passed by the learned Civil Judge



of Cawnpore allowing the objection of the judgment-debtor of an attached decree. We have arrived at the conclusion that this appeal should be allowed. The material facts are as follows:

[2] On 1-7-1927, Firm Ram Bux Nath Mal (hereinafter referred to for the sake of brevity as Nath Mal), the appellant in this case, obtained a money decree in Suit No. 1975 of 1927 from the Court of the Judge, Small Causes, Cawnpore, against Firm Ramdin Hazari Lal. Firm Ramdin Hazari Lal held a money decree, No. 227 of 1920, against Firm Mansa Ram Murli Dhar (hereinafter referred to for the sake of brevity as Mansa Ram) from the Court of the Judge, Small Causes, acting as Civil Judge. It was affirmed in appeal by the High Court on 25-6-1929.\*

[3] On 22-8-1932, Nath Mal applied for the execution of decree in Suit No. 1975 of 1927 by the attachment of the money decree No. 227 of 1920. The attachment was made according to the law and the execution application was dismissed on 9-8-1933, with an express order that the attachment of the decree shall subsist.

[4] There was another application for the execution of decree No. 1975 of 1927, on 17-4-1935, with the request that the decree should be transferred to Nagaon, district Jhansi. That application was dismissed on 24-8-1935.

[5] On 8-7-1937, Nath Mal applied, as the attaching creditor, for the execution of decree No. 227 of 1920 praying that the decree be realised by the arrest of Ram Saran, proprietor of Firm Mansa Ram Murlidhar. Ram Saran deposited 1/12th of the decretal amount and prayed for the stay of the execution under the Temporary Postponement of Execution of Decrees Act (U. P. Act 10 [X] of 1937). This was granted and on 23-8-1939, the execution record was consigned to the record room.

[6] The Temporary Postponement of Execution of Decrees Act expired on 31-12-1940, and on 7-3-1941, Nath Mal prayed that the attached decree No. 227 of 1920 be transferred to the Court of the Civil Judge for execution. The judgment-debtor Ram Saran filed an objection raising various pleas including the plea of 12 years' limitation. The objection remained pending for about two years and on 17-7-1943, it was dismissed and the decree was transferred to the Court of the Civil Judge.

[7] On 11-10-1943, Nath Mal, as attaching creditor, applied to the Civil Judge for the execution of the attached decree No. 227 of 1920 by the sale of certain immovable properties belonging to Mansa Ram. Thereupon Mansa Ram made an objection to the execution of the decree. A large number of grounds were taken, but most

of them were abandoned and only the following two were pressed before the learned Civil Judge: (1) That on 11-10-1943, when the last application for the execution of decree No. 227 of 1920 was made, not only that decree but also decree No. 1975 of 1927 was barred under S. 48, Civil P. C., by the 12 years' rule of limitation. (2) That as only decree No. 227 of 1920 had been transferred from the Court of the Judge, Small Causes, to that of the Civil Judge and decree No. 1975 of 1927 was not transferred, execution could not proceed on the application dated 11-10-1943.

[8] The learned lower Court held that the application for the execution of the attached decree No. 227 of 1920 was within time, but as decree No. 1975 of 1927 in which decree No. 227 of 1920 was attached was barred by the 12 years' rule of limitation, so the execution application dated 11-10-1943, was also time-barred and the execution could not proceed thereupon. The second ground taken by the judgment-debtor was repelled by the learned Civil Judge.

[9] The decree-holder comes in appeal and assails the view taken by the learned lower Court.

[10] The learned lower Court has lost sight of the fact that the present application dated 11-10-1943, for the execution of decree No. 227 of 1920 is a continuation of the execution proceedings initiated by the application dated 8-7-1937, by which the attached decree No. 227 of 1920 was sought to be executed. The execution proceedings initiated on 8-7-1937, were stayed at the instance of the judgment-debtor, Mansa Ram, under the provisions of the U. P. Temporary Postponement of Execution of Decrees Act. The proceedings had not terminated. The record was consigned to the record room with the intention of the proceedings being revived when the stay order was lifted. Within nine weeks of the expiration of the Temporary Postponement of the Execution of Decrees Act, the appellant applied for the continuation of those proceedings by the transfer of the decree to the Court of the Civil Judge. It was owing to the objection filed by the respondent Firm Mansa Ram that the case remained pending for about two years in the Court of Judge, Small Causes, acting as a Civil Judge, and it was on 17-7-1943, that the decree could be transferred for execution to the Court of the Civil Judge. Within about three months of this order, the decree-holder applied for the execution of the attached decree. Having regard to the provisions of S. 5, Temporary Postponement of Execution of Decrees Act (U. P. Act 10 [X] of 1937), it is clear that the execution application dated 11-10-1943, for the execution of decree No. 227 of 1920 was within time. No doubt on that date, viz. 11-10-1943 no application for

\* See ('29) 16 A. I. R. 1929 All. 890 — Ed.



the execution of decree No. 1975 of 1927 could be made as it would have been time-barred, but the appellant did not apply for the execution of decree No. 1975 of 1927. The application was for the execution of the attached decree No. 227 of 1920. By the attachment of this decree, the attaching creditor had stepped into the shoes of firm Ramdin Hazari Lal so far at least as the powers of its execution were concerned. The attaching creditor had a right to execute the attached decree for so long as its original decree-holder had. Where an application for the execution of a decree has been made within the statutory period of limitation by the attachment of a decree, an application for the execution of the attached decree can be made even after the expiry of the statutory period of limitation for the execution of the decree in which such attachment is made, provided there is limitation for the latter. To take an example, suppose an application for the execution of a decree is made within 12 years by the attachment and sale of some property and the attachment is made accordingly. It is obvious that further action can be taken by the decree-holder for the sale of the attached property even after the expiry of the period of limitation. In the same way if in the execution of any decree, a money decree is attached, the attaching creditor can execute the attached decree for so long as there is limitation for the execution of the attached decree.

[11] The learned Civil Judge has relied upon A. I. R. 1935 Lah. 508,<sup>1</sup> 9 A. L. J. 365<sup>2</sup> and A.I.R. 1926 ALL. 660.<sup>3</sup> A perusal of these cases will show that their facts are distinguishable from those of the present one. In none of these cases was there any attachment of decree. None of them lay down that for the execution of the attached decree it is essential that the decree in the execution of which such attachment was made should also be within time. All that they lay down is that an application for transfer of a decree for execution by another Court is not a substantive application for execution though according to A. I. R. 1926 ALL. 660<sup>3</sup> an application for transfer of decree can be treated as an application for taking a step in aid of execution. We are unable to see how these rulings help the judgment-debtor's case. It is not disputed that the period of limitation for the execution of the attached decree No. 227 of 1920 had not expired on 11th October 1943. Sub-rule (3) of O. 21, R. 53, Civil P. C., provides as follows :

"The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-r. (1), shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof."

[12] The learned Civil Judge has not rightly

interpreted this provision of the law. He has remarked that an attaching creditor does not acquire all the rights open to the decree-holder of the attached decree and has arrived at the conclusion that the attaching creditor cannot execute the attached decree after the expiry of the limitation of his own decree. We do not agree with this. There can be no doubt that for the purposes of executing the attached decree the attaching creditor possesses all the rights which the decree-holder of the attached decree possesses and he can execute that decree for as long as the decree-holder of the attached decree can under the law execute it. When the period of limitation for the execution of the attached decree No. 227 of 1920 had not expired on 11th October 1943, it cannot be held that the application made by Nath Mal on that date was time-barred.

[13] For the reasons given above, we allow the appeal, set aside the order passed by the lower Court and dismiss the objection filed by firm Mansa Ram Murli Dhar. The appellants shall have the costs of both the Courts from the respondents. The record shall forthwith be returned to the lower Court to proceed with the execution in accordance with the law.

V.B.B.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 176 [C. N. 83]**

MOOTHAM AND MATHUR JJ.

*Raja Ram — Appellant v. L. Chotey Lal and another — Respondents.*

First Appeal No. 204 of 1946, Decided on 16-10-1946, from order of Civil Judge, Bijnor, D/- 9-3-1946.

Criminal P. C. (1898), S. 476-B—Appeal against order of civil Court refusing to make complaint under S. 476 having no merits — Appeal can be dismissed summarily—Civil P.C.(1908), O. 41, R. 11.

In an appeal against an order of a civil Court refusing to make a complaint under S. 476 the proceedings under S. 476-B are to be regarded as civil. Accordingly S. 476-B must be read with the relevant provisions of the Code of Civil Procedure : 26 All. 249 (F. B.) and 24 A. I. R. 1937 All. 305 (F. B.), *Rel. on.* [Para 3]

Hence if the High Court on such appeal finds that there are no merits in the appeal it has power to dismiss the appeal summarily without issuing notice to the respondent : 18 A. I. R. 1931 Cal. 3 ; 18 A. I. R. 1931 Pat. 144 and 20 A.I.R. 1933 Mad. 767, *Ref.* [Para 3]

Cr. P. C. — ('46-Com.) S. 476-B; Note 4, pt. 9.

C. P. C. — ('44-Com.) O. 41, R. 11, Note 2.

*Jagnandan Lal — for Appellant.*

*Cases referred :—*

1. ('31) 58 Cal. 402 : 18 A.I.R. 1931 Cal. 3 : 129 I. C. 317, Muhammad Bayetulla v. Emperor.
2. ('33) 20 A. I. R. 1933 Mad. 767 : 147 I. C. 794, Krishnamachari v. Emperor.
3. ('31) 32 Cr. L. J. 735 : 18 A. I. R. 1931 Pat. 144 : 131 I. C. 536, Baidyanath Giri v. Emperor.
4. ('04) 26 All. 249 (F. B.), In the matter of Bhup Kunwar.
5. ('37) I. L. R. (1937) All. 517 : 24 A. I. R. 1937 All. 305 : 168 I. C. 434 (F. B.), Emperor v. Manni Lal.



**Mootham J.** — This is an appeal under S. 476B, Criminal P. C. against a refusal by the Civil Judge of Bijnor to make a complaint under S. 476 of that Code. We are of opinion that the appeal has no merits, and we think that there is no justification for directing the issue of notice to the respondents. It has however been argued by Mr. Jagnandan Lal for the appellant that we have no power summarily to dismiss the appeal and that notice must issue.

[2] There appears to be no direct authority in this Court on the point, and although it has been held by the Calcutta, Madras and Patna High Courts that a Court before which an appeal under S. 476B is filed has the power which we ourselves seek to exercise, in each instance the appeal arose out of the proceedings of a criminal Court and the decision proceeded on the basis that the appellate Court could, in such circumstances exercise some, if not all, of the powers vested in an appellate Court under Ch. 31, Criminal P. C. including the power under S. 421 to dismiss an appeal summarily: see 58 Cal. 402,<sup>1</sup> A. I. R. 1933 Mad. 767<sup>2</sup> and 32 Cr. L. J. 735.<sup>3</sup>

[3] In the present case the appeal is from the decision of a civil Court, and it has been laid down by this Court that in such circumstances the proceedings under S. 476B are to be regarded as civil; 26 ALL. 249;<sup>4</sup> and the view has been taken that this section must accordingly be read with such provisions of the Civil Procedure Code as may be relevant: I. L. R. (1937) ALL. 517.<sup>5</sup> I can see nothing in the terms of S. 476B which would, in such circumstances, make inapplicable the provisions of O. 41, R. 11, Civil P. C., and, in my opinion, we have, therefore, under that Rule, authority to dismiss the appeal summarily: and I would do so.

**Mathur J.** — I agree.

N.S. *Appeal summarily dismissed.*

**A. I. R. (34) 1947 Allahabad 177 [C. N. 84.]**  
MANSUR ALAM J.

*Rachcha and others—Defendants—Appellants v. Mt. Mendha and others—Plaintiffs—Respondents.*

Second Appeal No. 2092 of 1943, Decided on 5-8-1946, from order of Civil Judge, Basti, D/- 30-9-1943.

(a) Hindu law—Widow—Surrender—Essentials—Must be transfer of title *in præsenti* and of entire estate—Compromise by widow with reversioners agreeing not to transfer property and retaining possession thereof till her death—No transfer of any of widow's rights—Compromise held did not amount to surrender and not being for benefit of estate did not bind her heirs.

Two of the essential conditions of a valid surrender under the Hindu law are, first, that a surrender must be of the entire estate and, secondly, that there must be a transfer of title *in præsenti*. The effect of a valid

surrender is always to accelerate the succession and vest the whole property in the reversioners at once.

[Para 4]

A Hindu widow entered into a compromise with her reversioners agreeing thereby to remain in possession of the property for her life without any right of transfer and upon her death the reversioners were to enter into possession. She thereafter gifted the property to her daughter who after the widow's death sued the reversioners for possession. It was contended in defence that the compromise by the widow amounted to a surrender:

*Held* that the compromise did not amount to a surrender as no part of the rights in the widow's estate was transferred to or vested in the reversioners by virtue of the compromise. All that the widow did was to purchase peace by foregoing her right of alienation so as to enjoy the possession peacefully. The question of title was in no way dealt with or settled by the compromise which dealt with the question of possession only and nothing more. Moreover, the compromise being only for the personal benefit of the widow herself and not for the benefit of the estate was not binding on the heirs of the widow.

[Para 4]

(b) Registration Act (1908), S. 17—Compromise embodied in a petition to mutation Court dealing with question of title of property exceeding Rs. 100 in value is compulsorily registrable: 15 A. I. R. 1928 All. 641 (F. B.), *Foll.*

[Para 5]

Registration Act—

('45-Com.) S. 17, N. 60.

S. S. Verma — for Appellants.

A. P. Pandey — for Respondents.

*Case referred:—*

1. ('28) 26 A. L. J. 952 : 15 A. I. R. 1928 All. 641 : 51 All. 79 : 116 I. C. 861 (F. B.), *Ram Gopal v. Tulsbi Ram.*

**Judgment.**—The dispute in this case relates to certain properties belonging to one Ranjit who is said to have died some time in 1903, leaving a son Chulhai, a daughter Mt. Mendha and a widow Mt. Rajwanta. On his death, Chulhai entered into possession of the assets left by his father but he did not survive long and died very shortly after his father's death. On the death of Chulhai, a dispute appears to have arisen in the mutation Court between his mother Mt. Rajwanta on one side and Kirtarath and Sewak, the nephews of Ranjit, on the other. This dispute was settled by a compromise the terms of which were embodied in a petition dated 23-1-1924 which was filed in the mutation Court (Ex. A-5). By this compromise, it was agreed that Mt. Rajwanta shall remain in possession of the property for her life without any right of transfer and upon her death Kirtarath and Sewak will enter into possession. Accordingly Mt. Rajwanta entered into possession of the property and remained in such possession until her death on 17-5-1941. It appears that a few months before her death she had executed a deed of gift in favour of her daughter Mendha, i. e., the sister of Chulhai, and her two sons on 4-9-1940 and the present action has been brought by Mendha and her two sons.



[2] On the death of Rajwanta, a dispute cropped up again between Mendha and her sons on one side and the heirs of Kirtarath and Sewak on the other. The mutation Court appears to have held in favour of the latter and consequently Mendha and her sons filed the suit out of which this appeal has arisen. It is conceded that as a result of the recent legislation, Mendha, as sister of Chulhai, is unquestionably entitled to inherit in the absence of any other legal impediment.

[3] In defence the heirs of Kirtarath and Sewak pleaded that, prior to the aforesaid compromise in the mutation Court, there was an oral surrender by Mt. Rajwanta in favour of the reversioners and that this surrender was followed up by the compromise filed in the revenue Court. The finding of both the Courts on this point is against the defendants and is to the effect that no such oral surrender as has been set up by the defendants ever took place. Having lost on this plea, the defendants have now come up in second appeal and it is urged on their behalf that, even though the oral surrender was not proved as a matter of fact, the compromise filed in the revenue Court itself amounted to such surrender and must be deemed to have dealt with questions of title and not only questions of possession. I am afraid I am unable to agree with this contention.

[4] It must be remembered that two of the essential conditions of a valid surrender under the Hindu law are, first, that a surrender must be of the entire estate and, secondly, that there must be a transfer of title *in presenti*. The effect of a valid surrender is always to accelerate the succession and vest the whole property in the reversioners at once. It is clear that in the present case no such acceleration or vesting took place. All that Mt. Rajwanta was entitled to was the limited right of a Hindu woman to remain in possession of the property for life and that right was clearly retained by the lady by virtue of this compromise. It is also clear that no part of the lady's rights in the widow's estate was transferred to or vested in the reversioners. It seems to me that all that the lady did was to have purchased peace by foregoing her right of alienation so as to be in a position to enjoy possession of the property peacefully. As I read the compromise, I find nothing therein to indicate that the larger question of title was in any way dealt with or settled by it. I am of opinion that the compromise dealt with the question of possession only and nothing more. A compromise to be binding on the heirs must be proved by very cogent evidence and it must also be shown that it was for the benefit of the estate. The present

compromise, however, was, if anything, for the personal benefit of the lady herself in order to ensure to her a peaceful enjoyment of her right of possession. In this view of the matter, I agree with the Courts below that the rights of the plaintiffs were not in any way affected by this compromise.

[5] There is yet another impediment in the way of the defendants and that is that, even if we assume for a moment that this compromise dealt with questions of title also, it would in that case be inadmissible in evidence as it is conceded that the value of the property involved exceeds one hundred rupees and, as such, the compromise would be compulsorily registrable. This was the view taken by a Full Bench of this Court in 26 A. L. J. 952.<sup>1</sup> The test laid down in that case is fully complied with here. In the petition of compromise that was filed in the revenue Court it is clearly stated that the parties had come to a settlement and then the document goes on to specify the terms of that settlement. As I read the petition of compromise, it seems quite clear that it was not intended only to give information to the Court but that it was clearly intended to embody all the terms of the compromise. This being so, this petition of compromise, if it can be treated as a document of title, would be inadmissible in evidence.

[6] In the result, therefore, I would dismiss this appeal with costs. Leave to appeal under Letters Patent is refused.

D.R.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 178 [C. N. 85.]**

SINHA J.

*Shyam Kishore—Applicant v. Ram Nandan Singh and another—Opposite Party.*

Civil Revn. No. 483 of 1945, Decided on 27-8-1946, against decree of Civil Judge, Jaunpur, D/- 3-4-1945.

Civil P. C. (1908), S. 115 — Award attacked on technical ground — Award fair to all parties concerned — Lower Court refusing to treat award as adjustment — High Court will interfere in revision — Civil P. C. (1908), O. 23, R. 3 — Arbitration Act (1940), S. 47.

Where a reference to arbitration is challenged on the ground that no such reference could be made in proceedings relating to a succession certificate the award may be treated as an adjustment. Where in such a case the award is an eminently fair document, fair to all the parties concerned, and refusal to treat it as an adjustment within the meaning of O. 23, R. 3 will mean a negation of justice, the ends of justice demand that the High Court should, in the exercise of its revisional jurisdiction, interfere with the order of the lower Court refusing to treat the award as an adjustment : 33 A. I. R. 1946 All. 506, *Foll.* [Para 6]

C. P. C.—('44-Com.) O. 23, R. 3, N. 32.

S. S. Verma and Rama Shankar Prasad —  
for Applicant.

P. C. Chaturvedi — for Opposite Party.



*Cases referred :—*

1. ('42) 29 A. I. R. 1942 All. 145 : I. L. R. (1942) All. 357 : 199 I. C. 607 (F. B.), Dular Koeri v. Payag Koeri.
2. ('46) 1946 A. L. J. 285 : 33 A. I. R. 1946 All. 506, Sheikh Mohammad v. Mt. Rukmina Kunwar.

**Order.** — This is an application in revision against an order of the learned Civil Judge of Jaunpur by which he refused to treat an arbitration award as an adjustment within the meaning of O. 23, R. 3, Civil P. C. The facts are not in controversy and are briefly these :

[2] One Lachman had five sons, Radha Kishun, Achhaibar Lal, Kishun Kishore, Sheo Barat Lal and Sheo Saran. Radha Kishun had no children. On 9th September 1928, he executed a will in favour of his brothers. On 3rd July 1942, he is alleged to have executed another will solely in favour of one of his nephews, Ramnand the son of Sheo Saran. This was followed by yet another will on 21st August 1942, in favour of Kaushal Kishore the son of Jai Kishun and the grandson of Achhaibar Lal.

[3] It appears that after the death of Radha Kishun there was some controversy between the parties and an application for a succession certificate was made by Kaushal Kishore and Ramnand. The whole dispute was referred to arbitration and the arbitrator upheld the first will of 9th September 1928.

[4] The validity of the reference to arbitration was challenged on the ground that no such reference could be made in proceedings relating to a succession certificate. This objection was upheld. A request was then made by the applicant that the award might be treated as an adjustment within the meaning of O. 23, R. 3, Civil P. C. The Courts below have not acceded to this request and the present application has been made on behalf of one of the sons of one of the brothers, namely Sheobarat Lal.

[5] The learned counsel for the applicant takes his stand principally on the case in A.I.R. 1942 ALL. 145.<sup>1</sup> This case is an authority for the proposition that an award can be treated as an adjustment. Indeed, S. 46, (S.47?) Arbitration Act of 1940 itself provides that an award can be so treated.

[6] The learned counsel for the opposite party, however, contends that no question of jurisdiction is involved in this application in revision. It appears to me that the award is so eminently fair and the two subsequent wills are so obviously unfair to the rest of the family that the ends of justice demand that I should entertain this application. In a recent case reported in 1946 A. L. J. 285,<sup>2</sup> a Bench of this Court, in the exercise of its revisional jurisdiction, interfered with the order of the Court below even though it was technically right because it was

on the face of it unjust. I have already said that the award is an eminently fair document, fair to all the parties concerned, and refusal to treat it as an adjustment within the meaning of O. 23, R. 3, Civil P. C., will mean a negation of justice.

[7] I, therefore, allow this application in revision, set aside the order of the Court below and treat the award as an adjustment within the meaning of O. 23, R. 3, Civil P. C. The parties shall bear their own costs.

V.R.

*Application allowed.***A. I. R. (34) 1947 Allahabad 179 [C. N. 86.]**

ALLSOP AG. C. J. AND MATHUR J.

*Bindraban Behari — Objector — Appellant v. Oudh Behari and others — Opposite Party — Respondents.*

First Appeals Nos. 348 and 349 of 1942, Decided on 5-4-1946, from order of Special Judge 1st Grade, Fatehpur, D/- 13-3-1942.

Transfer of Property Act (1882), S. 124 — Deed transferring whole income of property without transferring property itself — Deed held gift of future income and invalid under S. 124.

A deed purported to dedicate the entire profits of a village to an idol and among other things contained the provisions that the executants, their heirs and successors should remain recorded as proprietors, that inheritance should be governed by the ordinary rules, that the land revenue should be paid by the executants, their heirs and successors from their own pockets and not out of the income of the property, that the property might be mortgaged, though not sold in order to pay the arrears of land revenue:

*Held* (1) that on the construction of the deed read as a whole there was no intention that the property itself should be vested in the idol. [Para 2]

(2) That the deed did not create a charge in favour of the idol, the provision as to mortgage being inconsistent with the creation of a charge, and [Para 3]

(3) that being a transfer by way of gift of future income of the property before it had accrued, it was inoperative by reason of S. 124, T. P. Act. [Para 3]

T. P. Act — ('45) Chitale, S. 124, Note 1.

S. N. Sen, Shambu Prasad and Shankar Sahai Verma — for Appellant.

N. P. Asthana — for Respondents.

**Allsop Ag. C. J.** — These appeals arise out of two proceedings under the Encumbered Estates Act. Two applications under S. 4 of the Act were made by two brothers and in each proceeding the question arose whether a share in the village of Deomai was the property of the applicants or was the property of Sri Thakur Bindraban Behari Ji. The share in dispute belonged to the family of which the two applicants were members but it is alleged that it was dedicated to the idol by a deed executed on 11-11-1864. The representatives of the idol produced a copy of this deed which was executed by Thakur Prasad and Janki Prasad, the two representatives of the family at that time. They



have also produced copies of two other documents dealing with partitions in the years 1878 and 1908 in which it was mentioned by the members of the family that this property had been dedicated to the idol. There was some question whether these documents were relevant, but that is a matter which, we think, we need not discuss.

[2] On the assumption that an attempt was made to dedicate the property in the year 1864, we still think that the property has not passed to the idol. According to this deed the two men, Thakur Prasad and Janki Prasad, directed that the profits of the village should be paid to the idol. It has been urged before us that this was in effect a dedication of the property itself, but we do not think that it is possible to put that construction upon the deed. The persons who executed the deed certainly said that the whole profits of the village should go to the idol and upon this fact the argument is advanced that a gift of the whole profits amounts to a gift of the share itself. We have been referred to the case in *[Venkatachariar v. B. Pachayappa Chettil]* A. I. R. 1926 Mad. 250.<sup>1</sup> This does not seem to us to be more than a decision upon the rules of conveyancing as understood in England and we do not think that such rules could apply to this province where conveyancing is not in the hands of trained conveyancers but of petition-writers who cannot be expected to know any technical rules or terms of art. We think that the deed must be construed as a whole. If it went no further than to say that the whole income of the property was dedicated to the idol there might be some force in the appellant's argument, but there are other terms in the deed. It is said quite clearly that the persons who executed the deed and their heirs and successors should remain recorded as proprietors of the property in the register of proprietors and that inheritance should be governed by the ordinary rules. It is also said that the land revenue due on the share shall be paid by those two persons and their heirs and successors out of their own pockets, if possible, and not out of the income of the share. There is a provision that the share may be mortgaged, though not sold, in order to pay off arrears of land revenue if the proprietors of the time have not been able to pay the money out of their own pockets. It seems to us quite clear on the construction of this deed that there was no intention that the property itself should vest in the idol.

[3] There is an alternative suggestion that the deed at least creates a charge in favour of the idol. That again we think is a suggestion which we cannot accept. The deed is not framed

as it would have been framed if there had been an intention to create a charge and we think the provisions for mortgaging the property in order to pay off arrears of land revenue is inconsistent with the creation of a charge. If the property was charged in this way that the whole of the income from it was to go to the idol, then we cannot see how there could be any mortgage executed by the proprietors because the mortgage itself should be subject to the charge and there would be nothing left for the mortgagee to enjoy. We are satisfied that the two men who executed the deed were under the impression that they could transfer the future income of the property to the idol without transferring the property itself or any interest in it and in our judgment they were mistaken upon this point. We may refer to the provisions of S. 124, T. P. Act. We do not see how the owners of the property could transfer the future income by way of gift before it had accrued. In our judgment the decision of the Court below that the property still vests in the applicants under the Encumbered Estates Act is a correct decision. We, therefore, dismiss the appeal with costs.

D.R./D.H.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 180 [C. N. 87.]**  
SINHA J.

*Mt. Hajra—Defendant-Appellant v. Dost Mohammad and another — Plaintiffs — Respondents.*

Second Appeal No. 477 of 1944, De'd 80-7-1946, from order of Civil Judge, Basti, D/- 30-11-1943.

(a) Muhammadan Law—Gift — Delivery of possession—Gift in favour of sister's son—Formality that gift should be followed by actual delivery of possession must be complied with.

It is true that in the case of a gift under Muhammadan law where the parties are closely related to each other, such as husband and wife or where the relationship is that of co-sharers, actual delivery of possession is not necessary. In the case of the former the relationship is so intimate that both live under the same roof and the law treats the possession of the one as the possession of another. In the case of the latter the possession of one is constructively the possession of the other. Where the donee is the donor's sister's son, such relationship, either in point of fact or as a fiction of law, does not exist and the formalities required by the Muhammadan law, namely, that the gift should be followed by actual delivery of possession must be complied with, more so when it is not the donee who is living in the house of the donor but it is the donor who has gone to the house of the donee and it is not the house property where the donor and the donee might have been living together. Failure to comply with such formalities must invalidate the gift: 19 A. I. R. 1932 P. C. 13 and 24 A. I. R. 1937 All. 547, *Ref.*

[Paras 3 & 4]

(b) Contract Act (1872), S. 16—Gift of entire estate in favour of sister's son — Son and son's wife left unprovided — Donor living in house of donee's mother at time of gift — Transaction of gift requires severe scrutiny.



There is a clear line of distinction between fraud and undue influence. Undue influence, like fraud, assumes myriad forms. [Para 2]

Where the donor is, at the time of the gift, living in the house of the mother of the donee and the gift deed, which covers practically the entire estate, is executed in favour of the sister's son when the son of the donor is alive and has to be provided and there is also the claim of the wife of the son which cannot, at least morally, go unrecognised, the transaction of gift requires not only careful examination but severe scrutiny. [Para 2]

*Mushtaq Ahmad and P. N. Sharma*—for Appellant.  
*J. Swarup* — for Respondents.

*Cases referred :—*

1. ('32) 1932 A. L. J. 663 : 19 A. I. R. 1932 P. C. 13 : 6 Luck. 556 : 59 I. A. 1 : 136 I. C. 385 (P.C.), *Mohammad Sadiq Ali Khan v. Fakr Jahan Begam*.
2. ('37) 1937 A. L. J. 486 : 24 A. I. R. 1937 All. 547 : I. L. R. (1937) All. 609 : 170 I. C. 824, *Jamil-un-nissa v. Mohammad Zia*.

**Judgment.** — By my order of 9-4-1945, I sent down an issue. The finding has been returned by the learned Civil Judge and is to the effect that the son survived the father. Exception has been taken to this finding, but it is one based on facts and is binding on me in second appeal. I shall, therefore, take it and proceed on the assumption that, on the date of the gift the son was alive.

[2] The question whether the gift was a good and effective gift has still to be determined. Before I decide the question of law I deem it necessary to address myself to the question of fact, i. e., the circumstances in which the gift was brought about. The donor was, at the time of the gift, living in the house of his sister, i. e., the mother of the donee. It is remarkable that this deed, which covers practically the entire estate, should have been executed in favour of a sister's son when the son of the donor was alive and had to be provided. Not only he, there were the claims of the wife of the son which could not—if not legally, at least morally—go unrecognised. I am conscious of the finding of the learned Munsif—although the learned Civil Judge has not discussed this point—that the transaction was not tainted with fraud. There is, however, a clear line of distinction between fraud and undue influence. Undue influence, like fraud, assumes myriad forms and it is conceivable that the finding of the learned Munsif, if he had taken all these factors into consideration, might have been in favour of the defendant on the basis of undue influence, if not on the basis of fraud. Having said so much I do not propose to pursue this point further than this that the transaction of gift requires, in words of their Lordships of the Judicial Committee, used in construing documents of a similar character and executed in similar circumstances, not only careful examination but severe scrutiny.

[3] The question of law is not so simple as the learned Civil Judge has put it. It is true that where the parties are closely related to each other, as for instance in 1932 A. L. J. 663<sup>1</sup>—the relation here was that of husband and wife—or where the relationship is that of cosharers, as for instance in 1937 A. L. J. 486<sup>2</sup> actual delivery of possession is not necessary. In the case of the former, the relationship is so intimate that both live under the same roof and it is not surprising if the law treats the possession of one as the possession of another : in the case of the latter the possession of one is constructively the possession of the other. In the present case that relationship, either in point of fact or as a fiction of law, does not exist.

[4] There is yet another circumstance which distinguishes this case from the class of cases mentioned above. It was not the donee who was living in the house of the donor. It was the donor who had gone to the house of the donee. It was again not house property where the donor and the donee might have been living together and there was, therefore, no necessity for delivery of possession. This being so, the formalities required by the Muhammadan law, namely that the gift should be followed by actual delivery of possession must be complied with. Failure to comply with them must invalidate the gift and I must, under the circumstances, hold that the gift was not an effective gift.

[5] I, therefore, allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs in all Courts.

D.H.

*Appeal allowed.*

[C. N. 88.]

\* A. I. R. (34) 1947 Allahabad 181

PATHAK AND BRAUND JJ.

*Hajie Saeed and Sons* — Applicant v.  
*Commr. of Income-tax—Opposite Party.*  
Civil Misc. No. 447 of 1941, Decided on 11-4-1946.

\* Income-tax Act (1922), S. 26A—Applicability—Existence of firm is condition precedent to applicability of section—"May" in R. 6A framed under section is permissive—Firm registered under section and renewals of registration granted in previous years—Income-tax Officer can refuse renewal of registration on ground of non-existence of firm and partnership deed being sham one.

The existence of a firm is a condition precedent to the applicability of S. 26A. The application for registration has to be made on behalf of a firm and not on behalf of any individual. If there is no firm, there is nothing to register. [Para 2]

The word "may" in R. 6A is not imperative in character but merely gives a discretion to the Income-tax Officer to grant a certificate on an application which is in conformity with the requirements of R. 6. The expression "the application is in order" relates to



the form of the application and not to the correctness of the statement made therein. [Paras 5 and 6]

It is, therefore, open to the Income-tax Officer to refuse the renewal of the registration of an alleged firm on the ground that there was no firm in existence and that the partnership deed was a mere sham, even though the firm had been duly registered under S. 26A and the renewals of the registration had been granted in previous years. [Para 8]

*N. P. Asthana, S. N. Verma, Gopal Behari, R. N. Verma and Radhey Shyam* — for Applicant.  
*Brijlal Gupta* — for Opposite Party.

*Case referred :—*

1. (1890) 44 Ch. D. 262 : 59 L. J. Ch. 661 : 62 L. T. 817 : 38 W. R. 417, *Baker, In re; Nichols v. Baker.*

**Pathak J.**—This is a reference made under S. 66 (3), Income-tax Act before its amendment in 1939 by the Commissioner of Income-tax. The question which has been referred to this Court for decision is as follows :

"Whether, in the circumstances of the case and having regard to the relevant rules framed by the Central Board of Revenue the Income-tax Officer was legally competent to refuse the renewal of registration of the assessee-firm for the assessment year 1939-1940 when the firm had been duly registered under S. 26A of the Act and renewal of registration had been granted in previous years."

The material facts giving rise to this reference are very short and may be stated thus. Three brothers, Haji Mohammad Rafi, Haji Mohammad Shafi and Haji Mohammad Sami are the assesseees in this case. They carry on business in the printing and sale of religious books at Cawnpore and Calcutta. On 16th July 1932, an instrument of partnership was executed by the assesseees, by which, according to them, they constituted a partnership in which they held equal shares. During the assessment year 1932-1933, an application for registration of this alleged firm was made under S. 26A, Income-tax Act by the assesseees. This application was granted and the firm was registered for that year. Thereafter applications for renewal of registration were made year after year and the last renewal certificate was effective until the end of the assessment year 1938-1939. On 25th November 1939, the assesseees again applied for renewal of the registration of the alleged firm for the assessment year 1939-1940 under R. 6 of the rules framed by the Central Board of Revenue in accordance with S. 59 of the Act. This application was rejected by the Income-tax Officer upon the ground that there was no firm in existence and that the instrument of partnership was a mere sham. In the result the Income-tax Officer made the assessment treating the assesseees as an "association of persons." In appeal the appellate Assistant Commissioner upheld this order. Thereupon an application was made to the Commissioner by the assesseees under S. 33 and in the alternative under S. 66, Income-tax Act. The Commissioner took the view that the

question as to whether there was an existing firm or not was a question of fact and the decision arrived at by the Income-tax Officer and the appellate Assistant Commissioner on that question was right. The Commissioner refused to make a reference to the High Court, as in his opinion, no question of law arose. Dissatisfied with the order of the Commissioner the assesseees made an application to this Court, praying that the Commissioner be directed to refer to this Court questions of law arising out of the order of the appellate Assistant Commissioner. This application was granted, with the result that the question mentioned above has been referred to us by the Commissioner.

[2] In order to appreciate the point in controversy it is necessary to quote S. 26A. That section is in these terms :

"26A. (1) Application may be made to the Income-tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax.

(2) The application shall be made by such person or persons, and at such times and shall contain such particulars and shall be in such form and be verified in such manner, as may be prescribed, and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed."

It would be at once apparent from the language of this section that the existence of a firm is a condition precedent to the applicability of the section. The application has to be made on behalf of a firm and not on behalf of any individual. If there is no firm, there is nothing to register. Rules have been framed by the Central Board of Revenue in order to carry out the purposes of S. 26A. It is necessary to examine these rules in order to judge the validity of the contention raised on behalf of the assesseees.

[3] Rule 2 prescribes that an application signed by all the partners and setting out the particulars as contained in the instrument of partnership must be made within the time mentioned in that rule. Rule 3 lays down that the application must be in the form given therein and must be accompanied either with the instrument of partnership or with its copy. That form requires a certificate to the effect that the profits (or loss, if any) of the previous year have been divided or credited, and it is necessary that the apportionment of the profits and loss should be shown in the application. According to these rules, it is also necessary to mention the particulars relating to the firm. Rule 4 points out the manner in which the application has to be dealt with and lays down that in case the Income-tax Officer is satisfied that there is a firm in existence and that the



application has been properly made, the certificate shall be granted. Rule 5 prescribes that the certificate of registration granted by the Income-tax Officer shall be effective only for the year mentioned therein.

[4] Now we come to another set of rules which deal with the renewal of firms already registered in the previous year. Rule 6 requires that the application for renewal must be accompanied by a certificate to the effect that the constitution of the firm has not been altered. It is worthy of note that this rule does not require the entry, in the application, of the particulars of partnership, nor a statement to the effect that the profits or loss have been apportioned. Rule 6A is important, as it is upon the interpretation of this rule that the decision of the question referred to us will mainly turn. That rule runs as follows :

"6A. On receipt of an application under R. 6 the Income-tax Officer may, if he is satisfied that the application is in order, grant to the assessee a certificate signed and dated by him in the following form : If the Income-tax Officer is not so satisfied, he shall pass an order in writing refusing to renew the registration of the firm."

[5] The question is whether the sense of the word "may" in R. 6A in the context is discretionary or compulsory. The contention of learned counsel for the assessee is that the word "may" in this rule means "must." I have no doubt that the word "may" in this rule is permissive and is an enabling expression. It gives the power to the Income-tax Officer to exercise a discretion. That discretion seems to be absolute and complete. The moment the Income-tax Officer is satisfied that the form of the application is as prescribed under the rules, the matter is left entirely to his discretion. In my judgment, the expression "the application is in order" relates to the form of the application and not to the correctness of the statement made therein. The view that I am inclined to take is reinforced by the circumstance that in the same rule the word "shall" has been used by the rule making authority. In my opinion, that authority has used these two different words by way of contrast; and, while using the word "may" it gave a discretionary power to the Income-tax Officer, by the use of the word "shall" it made imperative on him to pass the particular order mentioned therein. There is another circumstance which lends support to this view. As observed above, an application for renewal does not require the details of the partnership, nor does it require proof of its existence. Thus, it does not appear that any duty was cast upon the Income-tax Officer, while dealing with an application for renewal, to arrive at a definite finding upon the question of the existence of the

firm before he could pass an order on such an application.

[6] I am not unmindful of the cases in which it has been laid down that when the authority to whom a particular power is entrusted has got to exercise that power at the instance of a person who has got a statutory right to invoke that power, there is a duty resting upon that authority to exercise it in favour of that person. The present is not a case of that type. I cannot persuade myself to believe that it could be the intention of the rule making authority to cast a duty upon the Income-tax Officer to renew the registration of a firm, even though there was no firm in existence. Such a rule would be repugnant to the section itself and instead of carrying out the purposes of the section, would defeat its object. For this reason, I am clear in my mind that the word "may" in the rule is not imperative in character, but merely gives a discretion to the Income-tax Officer to grant a certificate on an application which is in conformity with the requirements of R. 6.

[7] The power, which the Income-tax Officer is to exercise, is not coupled with any duty. To hold otherwise will lead to absurdity, which will be apparent on a consideration of R. 6B. That rule provides that even where a certificate of registration or a renewal certificate has already been granted, if the Income-tax Officer comes to know that in fact there was no firm in existence, it is open to him to revoke his previous orders and cancel the certificates granted by him. It would be anomalous to hold that although he could cancel the certificates even after they had been granted, it was not open to him to refuse to grant those certificates when he became cognisant of those very facts which could entitle him to revoke his previous orders.

[8] For the reasons indicated above, I would answer the question in the affirmative, and would hold that it was open to the Income-tax Officer to refuse the renewal of the registration of the alleged firm for the assessment year 1939-40, even though the firm had been duly registered under S. 26A of the Act and renewals of the registration had been granted in previous years.

[9] **Braund J.**—I agree. In my opinion, the assessee in this case are faced with a painful dilemma. What the Income-tax Officer had to decide under R. 6A was whether the application of the assessee for renewal was in order. I do not wish to express a concluded view for myself as to what those words exactly mean. But, if the assessee accept the view which has been expressed by the Commissioner that this phrase obviously means that "the Income-tax Officer must be satisfied



that the application is in order in substance and not merely in form", then the assessee surely cannot escape from having to admit that the Income-tax Officer could go into the question whether the firm was in existence or not at the date of the application for renewal, because, as my learned brother has pointed out, that would lie at the very root of the question whether the application was "in order" in the sense referred to above. If, on the other hand, the assessee prefers to construe the words in question as referring only to the form of the application for renewal, then, in my judgment, they are in no better case. What they then have to do is to try to force the Income-tax Officer, on being satisfied merely with the form of the document of application, to grant them a certificate of renewal "whether he may desire to do so or not and indeed whether it may be proper that they should have one or not." In other words, the assessee has to convert the word "may" into the word "must" and to deprive the Income-tax Officer of the smallest discretion, so as in the end to reduce his Income-tax Officer's functions merely into those of clerk issuing a renewal certificate on demand.

[10] In my opinion the adoption of this later construction would be to reduce the whole rule to an absurdity; and not less so when we read the very next rule and observe that, having been forced to issue the renewal certificate he might ten seconds later, under Rule 6B, again revoke it.

[11] The true meaning, as I see it, of Rule 6A is this. In S. 26A, Income-tax Act all that is referred to is the registration of a firm. Nothing is said there about the renewal of a registration of a firm which has once been registered. It is true that under S. 59, Income-tax Act there are certain powers to make rules. What the rule-making authorities have done in this case is to make rules, not merely for registration, but also for the renewal of a registration, which is something that, in terms at any rate, the Act itself has not legislated for. No doubt, the rule-making authority has done this for the purpose of simplifying the procedure. It has in effect said that it shall not be necessary year by year to make a fresh application under S. 26A; but it shall be sufficient if, registration having once been effected, that registration is from time to time renewed. It is what may be described as a "short cut." Now, reverting again to Rule 6A, we are in a position to see that the authority which made these rules has been very careful and deliberate in what it has done. It has said that, where the Income-tax Officer is not satisfied that the application to travel by the "short cut" is in order, the In-

come-tax Officer is bound to refuse it and to send the applicant to the long way round. On the other hand, it has said something quite different in the case of the Income-tax Officer being satisfied that the application is in order. It has said that he "may" in that case grant a certificate of renewal. The distinction between the discretion implied in the word "may" and the peremptory emphasis of the word "shall" in this rule is most marked and, in my judgment, it would be quite impossible to say that the rule making authority, when it employed the word "may", did not intend it to have its usual discretionary force. As Lord Justice Cotton has said in (1890) 44 Ch. D. 262<sup>1</sup>:

"It may be a question in what case, where a Judge has a power given to him by the word 'may', it becomes his duty to exercise that power."

[12] Accepting the whole of that, it seems to me to be an impossible solution of this difficulty to suggest that the Income-tax Officer had a "duty" to renew a certificate when he knew, or may have known or may have been in possession of facts or suspicions showing that no genuine firm existed at all. As I have said before, a construction such as that would be reducing the rule to an absurdity.

[13] The order of the Court is accordingly that the question referred to us by the Commissioner of Income-tax, United Provinces, Central Provinces and Berar, should be answered in the affirmative.

[14] The assessee must pay the costs of this Reference. A copy of this order is to be sent to the Commissioner of Income-tax, United Provinces, Central Provinces and Berar under the seal of the Court.

[15] The fees of the Legal Adviser to the Income-tax Department will be taxed at the sum of a hundred and fifty rupees. Six weeks time will be allowed to the Legal Adviser to the Income-tax Department to file his certificate.

V.R.

*Question answered.*

**A. I. R. (34) 1947 Allahabad 184 [C. N. 89.]**

WALIULLAH AND BENNETT JJ.

*Chander Deo Sahi and others—Plaintiffs*  
— *Appellants v. Suraj Bali Rai and others*  
— *Defendants — Respondents.*

First Appeal No. 354 of 1942, De'd on 16-1-1946, from order of Civil Judge, Gorakhpur, D/- 8-4-1942.

Hindu law:— Debts — Pious duty of sons to pay father's debt — Suit upon debt against father — Decree against him and sale in execution are binding on sons unless they prove immoral nature of debt — General charge of immorality is not sufficient — There must be proof of direct connection between debt and act of alleged immorality.

The liability of the sons to pay the father's debts arises from the religious obligation to rescue him from the penalties arising from the non-payment of his



debts. A debt imposed upon the father by means of a decree of a Court of justice is nonetheless a debt owed by the father. It is the pious duty of the sons to discharge this liability like any other debt.

In a suit upon a debt against the father he represents the sons so far as the factum of the debt is concerned and the judgment against the father itself creates the debt. In the absence of fraud or collusion between the creditor and the father the factum of the debt cannot be questioned by the sons. The decree obtained by the creditor and the sale which follows in execution of the same would undoubtedly be binding on the sons unless the sons establish that the debt contracted by the father was for an immoral purpose. This onus cannot be said to have been discharged by proving a general charge of immorality. There must be proof of direct connection between the debt and the acts of the immorality alleged: *Case law referred.*

[Paras 3 and 7]

*L. M. Pant and H. C. Mukerji* — for Appellants.  
*C. S. Saran* — for Respondents.

**Cases referred:—**

1. ('44) 31 A. I. R. 1944 Lah. 220 : I. L. R. (1945) Lah. 67 (F. B.), *Mahadeo v. Ranbir Singh*.
2. ('04) 27 Mad. 243 (F. B.), *Periasami Mudaliar v. Seetharama Chettiar*.
3. ('05) 27 All. 16 (F. B.), *Karan Singh v. Bhup Singh*.
4. ('86) 13 I. A. 1 : 13 Cal. 21 : 4 Sar. 682 (P. C.), *Nanomi Babuasin v. Modhun Mohun*.
5. ('98) 21 Mad. 222, *Ramasamayyan v. Viraswami Ayyar*.
6. ('07) 34 Cal. 735, *Kishun Pershad Choudury v. Tepan Pershad Singh*.
7. ('93) 16 Mad. 99, *Natesayyan v. Ponnusami*.
8. (1900) 24 Bom. 343, *Joharmal v. Eknath*.
9. ('15) 37 All. 214 : 2 A. I. R. 1915 All. 126 : 28 I. C. 593, *Inder Pal v. Imperial Bank, Ltd.*
10. ('22) 44 All. 649 : 9 A. I. R. 1922 All. 310 : 69 I. C. 754, *Mohan Lal v. Bala Prasad*.
11. ('25) 47 All. 421 : 12 A. I. R. 1925 All. 327 : 86 I. C. 837, *Abdul Karim v. Ram Kishore*.
12. ('06) 33 Cal. 676, *Chander Pershad v. Sham Koer*.

**Waliullah J.** — This is a plaintiffs' appeal against the decree passed by the learned Civil Judge dismissing their claim for possession of some zamindari property. The plaintiff appellants and defendant respondents 3 and 4 are the sons of defendant respondent 2 Babban Prasad. Admittedly the appellants as well as the defendant-respondents 2 to 4 constituted a joint Hindu family and the property in dispute was the ancestral property of the joint family. Babban Prasad executed five simple money bonds in favour of Suraj Bali Rai, defendant-respondent 1. Suraj Bali Rai instituted suit No. 544 of 1928 for enforcing his claim on the basis of these bonds and obtained a decree for Rs. 1519-7-1 on 20-10-1930. In execution of this decree the property in dispute, namely two annas and eight pies share in village Tarman Sahu was sold by auction and purchased by the decree holder himself substantially in lieu of the decretal amount indicated above. Thereafter possession of the property purchased was secured by Suraj Bali Rai on 28th January 1931. The plaintiff-appellants instituted the pre-

sent suit on 19th October 1941 with the allegations that their father Babban Prasad Sahi, defendant 2 was an idiot or a man of rather a weak intellect, foolish and incapable of understanding. It was also alleged that he was addicted to *ganja* and *bhang* and was not capable of managing and protecting the property of his family. It was alleged that after the death of Gobind Prasad Sahi, the grandfather of the plaintiff-appellants, at the time of mutation objection was taken on behalf of the plaintiff-appellants by their mother that her husband was a lunatic and could not manage the property but the objection was overruled by the revenue Court and mutation was effected in the name of Babban Prasad Sahi and that thereafter persons who were characterised as the enemies and adversaries of the plaintiff's family took advantage of the situation and obtained bonds from him which were fictitious and without consideration. It was under these circumstances, so the plaintiffs alleged, that Suraj Bali Rai, defendant 1, obtained the five simple money bonds in his favour. There was no consideration for these bonds and there was no necessity for them, if any consideration passed it must have been spent on *ganja* and *bhang*. The bonds were, therefore, not binding upon the plaintiffs and the decree obtained by Suraj Bali Rai could not, therefore, in any way adversely affect the right of the plaintiffs to the property in dispute. In effect, therefore, according to the plaintiffs, Suraj Bali Rai, defendant 1, was a mere trespasser.

[2] The suit was contested by Suraj Bali Rai, defendant 1, alone. He pleaded that Babban Prasad defendant 2, was a clever person and executed all the five money bonds for consideration and legal necessity and, therefore, the decree obtained on foot of these bonds was binding on the plaintiffs. He also pleaded that he had been in adverse and proprietary possession of the property in question and, therefore, the suit was barred by time. It was further pleaded that the suit was barred by S. 11, Civil P. C., and was not maintainable as the plaintiffs who had filed an earlier suit No. 127 of 1930, but had later withdrawn it had not paid the costs of that previous suit. The learned Civil Judge found that Babban Prasad, defendant 2, the father of the plaintiff appellants, was intellectually a normal person and did not suffer from any special intellectual weakness as alleged by the plaintiffs. He also found that the suit was not barred either by time or by S. 11, Civil P. C. With regard to the principal issue in the case, however, on a consideration of the materials before him, the learned Civil Judge found that the five bonds on the basis of which the decree



had been obtained by Suraj Bali Rai, defendant 1, were for consideration but not for legal necessity. In view of this finding the learned Civil Judge proceeded to consider the legal position of the parties. He held that in order to get possession of the property in suit it was necessary for the plaintiffs to prove that the five simple money bonds in question were executed for immoral purposes. He considered the oral evidence of the three witnesses including that of plaintiff 1 as also the evidence given by Suraj Bali Rai, the contesting defendant, and came to the conclusion that the statements of the plaintiffs' witnesses were vague and general statements and failed to show want of consideration and necessity in respect of the five bonds in question. He also came to the conclusion that the evidence adduced by the plaintiffs failed to connect the five bonds in question with any particular act of immorality. He felt inclined to believe that Babban Prasad had been extravagant and might be addicted to *ganja* and *bhang* but that the plaintiffs had failed to prove that the bonds in question were tainted with immorality. In view of these findings the suit was dismissed with costs.

[3] Learned counsel for the appellants has strenuously contended that the materials on the record fully established that as a matter of fact no consideration passed in respect of the five money bonds on the basis of which the contesting defendant-respondent, Suraj Bali Rai, had obtained his decree in suit No. 544 of 1928. It was further contended that the plaintiff appellants were entitled to go behind the decree and to show that no debts were actually incurred by Babban Prasad. Lastly it was contended that the materials on the record clearly established that the so called debts incurred by means of these five bonds were tainted with immorality. Learned counsel for the appellants has taken us through the evidence of the three witnesses produced by the plaintiffs. He has also invited our attention to the fact that the mortgage deed dated 18.9.1928, which was executed by Babban Prasad in favour of a third person was found by the civil Court to be valid and binding upon the sons only for a small amount. We confess we find it impossible to attach any importance to the judgment of the civil Court regarding the mortgage aforementioned. The statements of the three witnesses produced by the plaintiff appellants do not show any connection, direct or indirect, between the debts incurred by means of the five bonds in question and the alleged immorality thereof. The statements made by the witnesses do not amount to anything more than mere general and vague assertions about the extravagance of Babban Prasad and about

his indulgence in *ganja* and *bhang*. Such statements, even if believed, are not all sufficient to establish that there was any definite connection between the debts incurred and the acts of extravagance or immorality of any sort or kind. The onus undoubtedly was upon the plaintiff appellants to establish that the debts incurred by Babban Prasad and evidenced by the five simple money bonds were incurred by Babban Prasad for immoral purposes. The decree obtained by Suraj Bali Rai and the sale which followed in execution of the same would undoubtedly be binding upon the plaintiff-appellants, the sons of Babban Prasad, unless the plaintiff appellants established that the debts contracted by the father were for an immoral purpose. This onus cannot be said to have been discharged by proving a general charge of immorality. There must be proof of direct connection between the debts and the acts of immorality alleged. The law on the subject is well expressed by Mulla in his well-known book on Hindu Law (10th Edition) at page 338 where it is observed :

"In a case where the son is under a pious obligation to pay the father's debt, the creditor may sue the father alone and obtain a decree against him, and he may execute the decree by 'attachment and sale of the entire interest of the father as well as the son in the joint family property, and the sale will bind the son, though he was not made a party to the suit, unless the debt contracted by the father was for an immoral purpose.'"

[4] This is undoubtedly well settled law and it has been repeatedly expounded by their Lordships of the Privy Council in numerous cases.

[5] Learned counsel for the appellants has contended that the sons are entitled to go behind the decree obtained against the father and to show that no debts were actually incurred by the father and that the decree obtained against him by Suraj Bali Rai was obtained by collusion between the creditor and the father. He has relied upon the decision of a Full Bench of the Lahore High Court in A. I. R. 1944 Lah. 220<sup>1</sup>. The majority decision of two learned Judges in this case no doubt supports the contention of the learned counsel. On the other hand, learned counsel for the respondents has contended on the strength of the Full Bench decision in 27 Mad. 243<sup>2</sup> and the Full Bench decision of this Court in 27 ALL. 16<sup>3</sup> that the decree debt as a debt of record due from the father is binding upon the sons unless they show that such debt was illegal or immoral.

[6] Learned counsel for the respondents has also invited our attention to Mayne's Hindu Law, 10th Edn., p. 431, where the law is stated thus :

"Where a sale or mortgage is made by the father without his son joining in it in order to satisfy his antecedent debt, or when in execution of a decree for



money or on a mortgage by the father the ancestral property is sold, the sons, not being parties, are entitled to have the nature of the debt tried in a suit of their own."

In this connection he has invited our attention to the foot note to the passage quoted above. The foot note reads thus :

"Some of the dicta of the Privy Council and of the Courts in India would entitle the son to dispute the fact of the debt also. 13 I. A. 1 at p. 18 : 13 Cal. 21,<sup>4</sup> 21 Mad. 222<sup>5</sup> at p. 226, 34 Cal. 735<sup>6</sup> at p. 742. It is fairly clear from the more recent decisions that in a suit upon a debt against the father, he represents the sons when they are not made parties so far as the factum of the debt is concerned and the judgment against the father itself creates the debt. Fraud or collusion, of course, will always be an exception. When a decree is passed against the father for a debt proved against him it is not easy to see how the sons can dispute the father's liability under it except of course in respect of the nature of the debt regarding which the father could not represent the sons. 16 Mad. 99,<sup>7</sup> 24 Bom. 343,<sup>8</sup> 27 Mad. 243<sup>2</sup> at p. 252, 27 All. 16,<sup>3</sup> 37 All. 214,<sup>9</sup> 44 All. 649,<sup>10</sup> 47 All. 421,<sup>11</sup> 33 Cal. 676.<sup>12</sup>"

[7] It seems to us that there is no doubt some conflict of judicial opinion on this question. The trend of the more recent decisions, however, seems to be in favour of the view that the father represents the sons so far as the factum of the debt is concerned and the judgment against the father itself creates the debt. In the absence of fraud or collusion between the creditor and the father, and, in the present case, we do not find any allegation of such fraud or collusion, it is difficult to see how the factum of the debt can be questioned by the sons. It must be remembered that the liability of the sons to pay the father's debts arises from the religious obligation to rescue him from the penalties arising from the non-payment of his debts. A debt imposed upon the father by means of a decree of a Court of justice is nonetheless a debt owed by the father. It is the pious duty of the sons to discharge this liability like any other debt. In short the position comes to this :

"Starting from the theory that it is a pious duty on the part of the son to pay his father's debts, the Hindu law liability of sons has proceeded step by step till the debts of the father, not being illegal or immoral, have become in every sense a liability of the joint estate of the father and the sons." (*vide* Mayne's Hindu Law, 10th Edition, page 423).

[8] In the present case, on the evidence led by the plaintiffs appellants, it is impossible to hold that they have succeeded in discharging the onus which lay upon them of establishing either that there was no debt owed by Babban Prasad to Suraj Bali Rai by means of the five simple money bonds in question or that any of the debts so incurred was tainted with any illegality or immorality or was incurred for any immoral purpose. As a matter of fact, there is no evidence directly connecting any of the debts evidenced by these bonds with any act of im-

morality or extravagance. It must, therefore, be held that the findings recorded by the learned Civil Judge were fully justified. It, therefore, follows that the plaintiff appellants have failed to substantiate their claim.

[9] In the result this appeal is dismissed with costs.

D.H.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 187 [C. N. 90.]**

ALLSOP AG. C. J. AND MATHUR J.

*Umrao and another — Judgment-debtors — Defendants — Appellants v. Behari Lal — Decree-holder — Plaintiff — Respondent.*

Letters Patent Appeal No. 20 of 1945, Decided on 2-4-1946, from judgment of Bennett J., in Second Appeal No. 1957 of 1943, D/- 22-1-1945.

(a) Limitation Act (1908), S. 15 — Section applies to suits and applications for execution stayed under U. P. Encumbered Estates Act.

The rule in S. 15, Limitation Act applies to suits and applications for execution stayed under the provisions of the U. P. Encumbered Estates Act, because the stay is the direct result of the order passed by the Collector under S. 6 of that Act : 30 A.I.R. 1943 All. 291, *Foll.* [Para 2]

Limitation Act — ('42-Com.) S. 15 N. 2.

(b) Limitation Act (1908), S. 15 — Application for final decree in mortgage suit is application for execution of decree within S. 15.

An application for a final decree in a suit on the basis of a mortgage is in effect an application to obtain execution of the decree for recovery of money by the sale of property, although in form it is a preliminary step before actual execution can be taken out. Such an application falls within the provisions of S. 15. Relief under S. 15 can therefore be claimed in respect of such an application : 28 A. I. R. 1941 Bom. 203, *Foll.* [Para 2]

Limitation Act — ('42-Com.) S. 15 N. 5.

S. B. L. Gour — for Appellants.

B. Mukerji — for Respondent.

Cases referred :—

1. ('43) 1943 A. L. J. 258 : 30 A. I. R. 1943 All. 291 : I L.R. (1943) All. 569 : 209 I. C. 541, Hulas Singh v. Data Ram.
2. ('41) 28 A. I. R. 1941 Bom. 203 : I. L. R. (1941) Bom. 435 : 197 I. C. 30, Govindnaik Gurunathnaik v. Basawannawa Parutappa.

**Allsop Ag. C. J.**—This is an appeal under the Letters Patent against the judgment of a learned single Judge of this Court. The appellants had executed a mortgage and the respondent had obtained a preliminary decree for sale against them. Before he could apply for a final decree the appellants made an application under S. 4, Encumbered Estates Act. The Collector passed an order under S. 6 of that Act on 23-12-1936. The proceedings remained pending until 25-5-1939 when the application was dismissed for default in the payment of printing charges. The respondent then made an application for a final decree on the basis of his preliminary decree for sale and was met by the plea that his application was



barred by limitation. It was barred if the period between 23-12-1936 and 25-5-1939, was not excluded but it was not barred if this period was excluded and the question arose whether the law allowed the exclusion of this period. The trial Court and the lower appellate Court held against the respondent: but the learned single Judge of this Court applied the principles of S. 15, Limitation Act and held that this application for a final decree was within time. This is an appeal against his judgment.

[2] After hearing considerable argument about this matter we have come to the conclusion that the learned single Judge was right. It was held by this Court in 1943 A. L. J. 258<sup>1</sup> that the rule in S. 15, Limitation Act applied to suits and applications for execution stayed under the Encumbered Estates Act because the stay was the indirect result of the order passed by the Collector under S. 6 of the Act. It was also held by the Bombay High Court in A. I. R. 1941 Bom. 203<sup>2</sup> that an application for a final decree in a suit on the basis of a mortgage should be considered to come within the provisions of S. 15, Limitation Act. Such an application is in effect an application to obtain execution of the decree for recovery of money by the sale of property, although in form it is a preliminary step before actual execution can be taken out. There is no reason in principle why this particular type of application should be excluded from the relief allowed by S. 15, Limitation Act. We would, therefore, follow the authorities we have quoted and agree with the learned single Judge.

[3] It has been assumed that S. 43, Encumbered Estates Act does not apply to this case. We have some doubt upon this point because if S. 43 does not apply to cases of this kind it would appear that all rights of suit or recovery of money would disappear merely from the fact that a debtor had failed to pay the necessary fees for the issue of an advertisement which seems a somewhat extraordinary result for the Legislature to produce. We, however, do not express any definite opinion upon this point as we agree with the learned single Judge about the application of S. 15.

The result is that the appeal fails and is dismissed with costs.

N.S.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 188 [C. N. 91.]**

VERMA AND BENNETT JJ.

*Maharaja Bahadur Ram Ran Bijai Prasad Singh—Plaintiff—Appellant v. Sarjoo Singh and others—Defendants—Respondents.*

Second Appeal No. 2200 of 1944, Decided on 29th April 1946, from decision of Civil and Sessions Judge, Benares, D/- 23-5-1944.

(a) U. P. Encumbered Estates Act (25 [XXV] of 1934), S. 11—Person failing to put forward claim to property specified in notice — Suit to establish his title to it is not maintainable.

It was clearly the intention of the Legislature to secure finality on all questions of title which might be raised in proceedings under the Encumbered Estates Act. A person who failed to put forward a claim to property specified in the notice referred to in S. 11 cannot maintain a suit to establish his title to it in the ordinary civil Courts: 34 Cal. 470, *Rel. on*; 2 C. L. J. 359; 20 A. I. R. 1933 All. 358 and 12 A. I. R. 1925 All. 380 (F. B.), *Disting.* [Para 12]

(b) U. P. Encumbered Estates Act (25 [XXV] of 1934), S. 11 — Act does not create a right in S. 11.

It cannot be said that the U. P. Encumbered Estates Act creates a right in S. 11. That section only lays down a procedure for the determination of claims. [Para 10]

*N. P. Asthana and Sri Narain Sahai—*  
for Appellant.

*Shiv Charan Lal —* for Respondents.

*Cases referred : —*

1. ('07) 34 Cal. 470, Rameshwar Singh v. Secretary of State.
2. ('05) 2 C. L. J. 359, Bhandi Singh v. Ramadhin Rai.
3. ('33) 1933 A. L. J. 303 : 20 A. I. R. 1933 All. 358 : 55 All. 406 : 142 I. C. 403, Joty Prasad v. Amba Prasad.
4. ('25) 47 All. 513 : 12 A. I. R. 1925 All. 380 : 87 I. C. 51 (F. B.), Abdur Rahman v. Abdur Rahman.
5. ('43) 30 A. I. R. 1943 Oudh 410 : 19 Luck. 300 : 208 I. C. 472, Imtiaz Ali Khan v. Badruddin.

**Bennett J.** — The question raised by this second appeal is a simple but important one. It is whether a person who failed to put forward a claim to property specified in the notice referred to in S. 11, U. P. Encumbered Estates Act can maintain a suit to establish his title to it in the ordinary civil Courts. This question has been answered by both the Courts below in the negative.

[2] The plaintiff is the Maharaja Sahib of Dumraon and he brought the suit for possession of a 1/16th share in village Madhopur on the basis of the purchase by him of that share at an auction sale in execution of a decree for arrears of rent in 1934. His application for mutation was dismissed by the revenue authorities, the final order being passed by the Commissioner in 1941.

[3] The respondents made their application under S. 4, Encumbered Estates Act in 1935 and included this property in their written statement as their own. It is not disputed that thereafter it was included in the notice published under S. 11 and that no claim to it was made by the Maharaja Sahib. It was eventually included in the property found by the Special Judge to be liable to attachment, sale or mortgage in satisfaction of the debts of the applicants, and the Special Judge informed the Collector accordingly under S. 19 (2) of the Act.



[4] Admittedly there is no authority upon the question stated, the reason for which may be that the decision in the proceedings under the Encumbered Estates Act has been generally accepted as conclusive.

[5] It was pointed out by the Munsif who tried the suit that under sub-s. (4) of S. 11 any order passed by the Special Judge under that section shall be deemed to be a decree of a civil Court of competent jurisdiction; and in first appeal the Civil Judge, relying upon the same provision, held that finality thus attaches to the proceedings. The failure of the appellant to put forward a claim in those proceedings is, he considered, fatal. The Civil Judge also pointed out that it was still open to the appellant to apply to the Special Judge under the proviso to sub-s. (2) of S. 11 to have the question of title re-opened.

[6] It may first of all be noted that the provision in S. 11 (2) that a person having any claim to the property mentioned in the notice shall make an application to the Special Judge stating his claim within a certain period is mandatory. The proviso to that sub-section allowing later applications to be made was added by an amending Act of 1939, presumably to meet hard cases, and we think that the enactment of this amendment supports the view that the decision of the Special Judge cannot be questioned otherwise than in the proceedings before him. If it was open to a claimant to agitate his claim in the ordinary civil Courts ignoring the proceedings under the Encumbered Estates Act, there would have been little need to add the proviso. Moreover, the whole scheme of the Act seems clearly designed to secure finality both as regards the claims of creditors and also as regards claims to the property published as that of the applicant. There is an express provision in S. 13 that claims of creditors not made as required by the Act shall be deemed to have been discharged. Learned counsel for the appellant has referred to the absence of any corresponding provision that the order passed by the Special Judge under S. 11 is conclusive on the point of title and bars the litigation in other Courts, but we do not think that the absence of an express provision warrants the inference that such litigation is maintainable. Though the matter may not be covered expressly by S. 11, Civil P. C., the principle of *res judicata* is, we think, applicable. Section 11, Encumbered Estates Act, requires all claims to the property to be put forward in the proceedings before the Special Judge and the order passed by him under the section is defined as a decree of a civil Court of competent jurisdiction. Thus when no objection is taken on the published notice, his

order with regard to the property claimed by the applicant under S. 11 must have the same effect.

[7] We are fortified in this view by a decision of a Bench of the Calcutta High Court in 34 Cal. 470.<sup>1</sup> That is a converse case, but none the less relevant on that account. In that case land had been acquired under the Land Acquisition Act, but the procedure prescribed by that Act had not been followed and in particular the notice published under S. 9 of the Act had not contained the material facts which would enable the landowner to identify the land intended to be acquired. It was held by the Calcutta High Court that a suit would lie in the civil Court in respect of a claim for damages which could not be foreseen at the time of the acquisition proceedings. It was clearly held that the suit was maintainable only by reason of defects or irregularities in the acquisition proceedings. Reference was made to another decision of the same High Court in 2 C. L. J. 359<sup>2</sup> that when statutory rights and liabilities have been created, and jurisdiction has been conferred upon a Special Court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Courts. Conceding this principle, the Bench in 34 Cal. 470<sup>1</sup> observed :

"It is well settled, however, that even where a specific remedy is provided by a statute, it is necessary, in order to remit the owner to such remedy and exclude his remedy by suit, that the party acquiring the property should have substantially complied with its requirements; and where the proceedings for acquisition are not perfected and completed, they will not debar the remedy by a regular suit. The essence of the matter is that the party has his remedy before the special Court. Where, however, as here, the party has not been able to put forward his claim by reason of defects or irregularities in the proceeding, or where the claim has been put forward but not adjudged, the jurisdiction of the civil Court cannot be treated as superseded."

[8] In the present case, there is no suggestion whatever of any defect or irregularity in the proceedings before the Special Judge and, therefore, the appellant cannot claim that the civil Court is invested with jurisdiction on this ground. He can only claim that the ordinary civil Court has concurrent jurisdiction with the Court of the Special Judge in all such cases, and we consider that such contention is refuted both by the scheme of the Encumbered Estates Act and the general principle referred to in this Calcutta case.

[9] We were also referred to decisions of this Court in 1933 A. L. J. 303<sup>3</sup> and 47 ALL. 513.<sup>4</sup> In the first case the question was whether a civil Court had jurisdiction to try a case challenging the validity of the election of a chairman of a Dis-



strict Board, and it was held that the civil Court has no jurisdiction, there being special provision in the District Boards Act for the determination of the question. It was said (at p. 308) that :

"It is well settled that where the statute which creates the right also prescribes a particular remedy for the infringement of that right, that remedy, and that remedy alone, can be pursued by the person complaining of the infringement of the right for the redress of the alleged wrong done to him."

the earlier case in 47 ALL. 513<sup>4</sup> being referred to.

[10] These decisions are not so relevant as that in the Calcutta case because it cannot be said that the U. P. Encumbered Estates Act creates a right in S. 11. That section only lays down a procedure for the determination of claims but it may be said that the person aggrieved should be limited to the remedy there prescribed. The right of an owner is infringed where his property is wrongly claimed by an application under the Encumbered Estates Act and the object of the notice published under S. 11 is to enable a person aggrieved by the inclusion of his property in that notice to apply to the Special Judge stating his claim to it, upon which claim being made the Special Judge shall determine whether the property is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. A special procedure is thus prescribed for the determination of a claim of this kind and we entertain no doubt that a person having any such claim is required by this section to have it determined in the proceedings under the Encumbered Estates Act and is precluded from making it elsewhere.

[11] A case of the Oudh Chief Court, A. I. R. 1943 Oudh 410,<sup>5</sup> decided by a member of this Bench, was also referred to; but the facts in that case were different, in that the question was whether, when proceedings are pending under the Encumbered Estates Act, it is open to a person to agitate a claim of the nature referred to under S. 11 of that Act in proceedings under S. 145, Criminal P. C. It was held that such proceedings were clearly objectionable, the only forum in which the claim could be advanced being that of the Special Judge seised of the application under the Encumbered Estates Act.

[12] For the reasons given, we have no doubt that the decision of the Courts below dismissing the suit was correct. It was clearly the intention of the Legislature to secure finality on all questions of title which might be raised in proceedings under the Encumbered Estates Act and any other view would open wide the door to a multitude of suits in the ordinary civil Courts and throw doubt upon the conclusive character of all orders passed by Special Judges

under S. 11. We accordingly dismiss this appeal with costs.

D.S.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 190 [C. N. 92.]**

**FULL BENCH**

**ALLSOP, MATHUR AND SHANKAR**

**SARAN JJ.**

*Rishidev Sondhi v. Dhampur Sugar Mills.*

Civil Misc. No. 178 of 1942, Decided on 1.4.1946, order of reference submitted by Chief Inspector of Stamps, D/- 7.4.1942.

Stamp Act (1899), S. 2 (17)—Money is not "specified property".

An instrument in which specific sums have been offered as security is not a mortgage-deed within the meaning of S. 2 (17) as money is not specified property. [Para 6]

Stamp Act — ('45-Com.) S. 2 (17), N. 14.

*Mansur Alam* — for the Crown.

*P. N. Haksar* — for Applicant.

*Reference.*—I have the honour to submit for the orders of the Hon'ble High Court copies of two documents which were detected by the Inspector of Stamps, Bareilly Circle, in the course of his inspection of the records of the Court of Additional Civil Judge, Bijnor. These documents were filed in Suit No. 32 of 1939, Messrs. Rishidev Sondhi v. Dhampur Sugar Mills.

[2] The document bore stamps of annas 12 and annas 8 as if they were mere agreements. But the Inspector was of opinion that they were mortgage-deeds with possession chargeable under Art. 40 (a), Stamp Act. He, therefore, brought the two instruments to the notice of the Court in para. 7 of his inspection note suggesting that the documents be impounded and deficit duty and penalty levied in respect of them under S. 35 of the said Act.

[3] The learned Court, however, in its order dated 14th August 1940 disagreed with the Inspector and held that the documents were not mortgage deeds, but mere agreements and as such properly stamped.

[4] As would appear from a perusal of the documents, they are mortgage deeds without possession, chargeable under Art. 40 (B), Stamp Act, as the usufruct of the money deposited would not be enjoyed by the mortgagee, but will go to the mortgagor. The Inspector's opinion that the documents were mortgages with possession does not seem to be justified. The Court's view that there is no mortgage of money and the documents do not, therefore, come under the category of mortgage deeds, hardly finds support from the definition of a "mortgage" as given in S. 2 (17), Stamp Act, which is much wider than that given in the Transfer of Property Act and which includes every instrument whereby, for the purpose of money advanced, or to be advanced,



by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers or creates, to, or in favour of, another a right over or in respect of specified property. The specified property may be immovable or moveable. The latter includes cash or equivalent of cash. In the cases under consideration specific sums have been offered as security. The amounts deposited with the other party are, therefore, "specified property" within the meaning of S. 2 (17), Stamp Act, and the documents in question come under the category of mortgage deed for purposes of stamp duty.

[5] In exercise of the powers of a Collector conferred upon me by Government Notification No. 4135/X-525, dated 20th August 1928, I refer the matter for the orders of the Hon'ble High Court under S. 61, Stamp Act, and request that a declaration be made in terms of sub-s. (2) thereof.

[6] **Allsop J.** — In our judgment money is not moveable property. Specie might possibly be, but that question does not arise in this case. The instruments which are the subject of this reference are not mortgage deeds. The stamp duty paid is sufficient.

G.B.

*Reference answered.*

[C. N. 93.]

**A. I. R. (34) 1947 Allahabad 191**

**FULL BENCH**

**VERMA C. J.; YORKE, WALIULLAH,  
MOOTHAM AND MATHUR JJ.**

*Debi Prasad — Applicant v. Emperor.*

Criminal Revn. No. 364 of 1946, Decided on 18th December 1946, from judgment of Sinha and Mansur Alam JJ. in Cri. Revn. No. 1271 of 1945, D/- 27-7-1946.

(a) Defence of India Rules (1939), R. 119—R. 119 does not require that person concerned should have actually been informed of the order and should have actual knowledge of it.

Rule 119 provides something in the nature of an exception to the general rule *ignorantia legis non excusat*; but only to this extent that it provides in effect that unless and until there has been publication of notice of an order (for example an order under R. 81(2)) no one can be punished for a breach of the order. It does not, however, require that any given person should have actually been informed of the order and should have actual knowledge of it. On the contrary, after publication of the order the persons concerned, that is those whom the order concerns, shall be "deemed" to have been duly informed of the order. [Para 9]

It is not necessary for the prosecution to prove actual information, that is, actual communication, to the alleged offenders. Once publication had been made the persons affected by the order are to be deemed to have been informed and when a person is deemed to have been informed, it is not open to him to show that he was not actually informed. Rule 119 lays down, that there may be either actual information or constructive information and either is equally effective. [Para 17]

(b) Defence of India Rules (1939), R. 119—R. 119 does not affect validity of order but only affects operation of order.

Rule 119 is procedural and the only object of the rule is to secure either direct or constructive notice of the order to the person or persons concerned, and the validity of the order is not affected at all by the rule. What is affected by R. 119 is the operation of the original order in the sense that in the absence of communication, direct or constructive, a breach of the order cannot be made punishable. [Para 10]

The publication or communication of the order and its validity are two entirely separate matters. The order itself when once it is signed is a perfectly good and valid order, but no one can be convicted for a breach of the order unless and until there has been a communication either direct or constructive by publication in accordance with the terms of sub-r. (1). [Para 28]

(c) Evidence Act (1872), S. 114 — Illustrations—Court can go back to main section and consider whether it is applicable to any given set of facts.

The illustrations in S. 114, Evidence Act, are nothing but illustrations and it is always open to a Court to go back to the main section and consider whether that section, as it stands, is applicable to any given set of facts so as to enable the Court to draw inferences from those facts. [Para 14]

(d) Defence of India Rules (1939), R. 119 — Order passed by authority published by it in official Gazette — It may be presumed that it was aware of provisions of R. 119 and that publication in Gazette was made in considered compliance with all its provisions including provision as to determination of most suitable form of publication.

Where an authority, *ex hypothesi* an official acquainted with the Defence of India Rules, makes an order which again *ex hypothesi* he is aware should be published in the manner best adapted for informing the persons concerned, it is to be presumed that he must have given thought to the method of publication. [Para 24]

The authority—the Provincial Government—operates through different persons, the Governor, the Minister or under S. 93 the Adviser, the Secretary or the Deputy Secretary; but when an order is made by any of these, it is sent through ordinary channels to the Official Gazette and the mere fact that it is sent on by the higher officer implies that it has to go through the lower ranks to the proper destination. Illustration (e) of S. 114, Evidence Act, covers the whole of the procedure with leads to the publication of a Government order under the Defence of India Rules in the Official Gazette. [Para 24]

It cannot be said that the only presumption which can be made under S. 114, Evidence Act, is that some one, not necessarily the authority which made the order, decided on the best form of publication and ordered publication in the Official Gazette. [Para 26]

Hence the publication of the U. P. Cotton Cloth and Yarn Control Order in the official Gazette gives rise to the presumption under S. 114, Evidence Act, that the provisions of R. 119 (1), Defence of India Rules, including the provision for determining the most suitable form of publication, were fully complied with: 34 A. I. R. 1947 All. 105 and 33 A. I. R. 1946 Pat. 1 (F. B.), *Approved*; *Case law discussed*. [Para 32]

*P. L. Banerji, G. S. Pathak, Shri Rama and S. N. Katju* — for Applicant.

*Government Advocate* — for the Crown.

*Cases referred:—*

1. *Reported in* ('47) 34 A. I. R. 1947 All. 109, *Baijnath v. Emperor*.



2. ('46) 1946 A. W. R. 428 : 34 A. I. R. 1947 All. 105 : 226 I. C. 204, Raj Bahadur v. Emperor.
3. ('45) 1945 A. L. J. 182 : 32 A. I. R. 1945 All. 291: I.L.R. (1945) All. 531:221 I. C. 134, Girdhari v. Emperor.
4. ('45) 1945 A. L. J. 357 : 32 A. I. R. 1945 All. 280 : I.L.R. (1945) All. 682: 221 I. C. 302, Krishan Chandra v. Emperor.
5. ('44) I. L. R. (1944) Nag. 150:31 A. I. R. 1944 Nag. 40 : 211 I. C. 29, Shakoor Hassan Kachhi Memon v. Emperor.
6. ('45) 1945 A. L. J. 499 : 33 A. I. R. 1946 All. 223 : 224 I. C. 76, Akbar v. Emperor.
7. Cri Ref. No. 1161 of 1945, decided on 12th February 1946, Shankar Deo v. Emperor.
8. ('46) 1946 A. W. R. 432 : 34 A. I. R. 1947 All. 12 : 225 I. C. 255, Bala Prasad v. Emperor.
9. ('45) I.L.R. (1945) 24 Pat. 781 : 33 A.I.R. 1946 Pat. 1 : 223 I. C. 263 (F.B.), Mahadeo Prasad Jayaswal v. Emperor.
10. (1918) 1 K. B. 101 : 87 L. J. K. B. 122 : 118 L. T. 95, Johnson v. Sargant.
11. ('45) I.L.R. (1945) Nag. 382: 32 A. I. R. 1945 Nag. 159, L. M. Wakhare v. Emperor.
12. ('44) 46 Bom. L. R. 495 : 31 A. I. R. 1944 Bom. 259 : I L R. (1945) Bom. 103: 220 I. C. 486, Emperor v. Rayangouda Lingangouda Patil.
13. ('45) 32 A. I. R. 1945 Bom. 368 : I. L. R. (1945) Bom. 681 : 221 I. C. 239, Leslie Gwilt v. Emperor.
14. ('05) 32 Cal. 1107, Narendra Lal v. Jogi Hari.
15. ('45) 32 A. I. R. 1945 Bom. 389, Mhatarji Bhau Patil v. Emperor.

**Yorke J.** — This application in revision has been referred to this Full Bench on the view that in Criminal Revision No. 1271 of 1945<sup>1</sup> decided by Sinha and Mansur Alam JJ. on 25th July 1946 the interpretation of R. 119, Defence of India Rules adopted by another Division Bench consisting of the then Chief Justice and Braund J. in 1946 A. W. R. 428<sup>2</sup> had been doubted. The judgment in Criminal Revision No. 1271 of 1945<sup>1</sup> was not available to the learned single Judge and in my own personal opinion the statement made to him by the learned Government Advocate and learned counsel, Mr Pathak, was not a correct statement. (It is said that this was due to a misapprehension.) However, the case having come before us has been argued at length for more than three days and it has been contended before us that the view of R. 119 taken by the Division Bench is unsound and that this Full Bench should overrule it.

[2] The matter arises in this way: Section 2(1), Defence of India Act, provides that:

"The Central Government may by notification in the Official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the community."

[3] Sub-section (2) of this section contains a "very long list of matters for which the rules may provide or for which the rules may empower another authority to make provision by

means of orders. Clause (iv) of sub-s. (3) provides that:

"The rules made under sub-s. (1) may confer powers and impose duties:

(b) upon any Provincial Government or officers and authorities of any Provincial Government as respects any matter notwithstanding that that matter is one in respect of which the Provincial Legislature has no power to make laws."

[4] Under the provisions of S. 2, Defence of India Act, the Defence of India Rules were made by the Government of India. Among the rules enacted is R. 81. Sub-rule (2) of R. 81 provides that:

"The Central Government or the Provincial Government, so far as appears to it to be necessary or expedient for securing the 'defence of British India or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community, may by order provide—"

for a large number of matters, for example:

(a) for regulating or prohibiting the production, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles or things of any description whatsoever . . ."

[5] In exercise of the powers conferred by this rule the Government of India issued a Cotton Cloth and Yarn (Control) Order in 1943. The United Provinces Government also issued such a Cotton Cloth and Yarn Control Order on 26th May 1943. But this order was replaced by the later order with which we are concerned in this case — The United Provinces Cotton Cloth and Yarn Control Order 1943, (Notification No. M-5786/C.S., dated 21st July 1943). At a subsequent date, namely 4th July 1944, the Provincial Government added a fresh cl. 6a, to this Order, and this amendment, published in the form of a notification in the U. P. Government Gazette of 15th July 1944, provides that :

"Every dealer except a hawker registered under sub-clause (1) of cl. 4 of this Order shall maintain correct accounts of the business carried on by him."

Earlier in the Order there is to be found a definition of the word 'dealer' as 'a person carrying on the business of selling cotton cloth or yarn or both, whether wholesale or retail, and whether or not in conjunction with any other business."

[6] The applicant, Debi Prasad, prior to the year 1945 was carrying on a grocery business in the town of Cawnpore. Subsequently he obtained a licence to sell cloth to the public as a retail dealer and it is stated that he started his business as a retail cloth dealer on 18th January 1945. He claims to have purchased two 'bahi khatas', that is blank books of the ordinary kind used for keeping shop accounts, but he took only one of these into use and admittedly he maintained no accounts of any kind except a 'rokar bahi' which may be called a daily cash account. For about a fortnight before the shop was



opened the applicant was obtaining cloth on credit from wholesale dealers but was not paying for the cloth, the custom of the trade allowing him 15 days for payment. From the 18th (or 19th) the business of selling cloth was started. On 4th July 1945 an Inspector of the Textile Control and Enforcement Force searched the shop of the applicant and his residential house which was above the shop. In the course of this search he found in a room on the shop floor adjoining the shop items of cloth, Exs. 16 to 92. From the residential portion of the house on the first floor he recovered items, Exs. 1 to 15. The applicant himself appeared at some stage of the proceedings and made over to the Inspector the 'rokar bahi' and a statement, Ex. P-4, which is supposed to be a copy of a statement of the stock of cloth as present in the shop on 2nd July. It was further stated that Exs. 16 to 92 were more or less concealed underneath some sacks. By admission there was at this time no entry in the books of the applicant in respect, at any rate, of Exs. 16 to 92, and it was doubtless for the reason that when questioned as an accused on 2nd October 1945 the applicant said that it was not Exs. 16 to 92 which were found in the room behind the shop but only Exs. 1 to 15. Not only did he make this statement at this date, but having stated on 2nd October that he would file a written statement, he proceeded on 7th December in the said written statement to elaborate the original statement and to allege that items 16 to 92 were articles which he had collected bit by bit for a 'gauna' ceremony in the family. As regards Exs. 1 to 15, he said that they were included in an invoice which was received at the shop in his absence on 26th June and that as he only returned home from this absence on 4th July after the search had been made, he had not had any opportunity to enter these items in his account book Ex. P-2. The defence was rejected on facts because it was held that Exs. 16 to 92 were found in the room behind the shop. It being the applicant's own contention that these were not found there but somewhere else and were items which he had not entered in his accounts, nor (by implication) had ever intended to enter in these accounts, once it was found that they were a part of the stock, the conclusion was irresistible that the accounts were not being correctly maintained and that this was intentional on the part of the applicant. In these circumstances, the Magistrate convicted the applicant of an offence under R. 13, United Provinces Cotton Cloth and Yarn Control Order and taking the view that this cloth had been put aside for black marketing, he sentenced the applicant and his son each to undergo 18 months'

rigorous imprisonment and also each to pay a fine of Rs. 1000 with a further 6 months' rigorous imprisonment in default. He also directed that the cloth recovered from the room should be forfeited to Government.

[7] The matter was taken in appeal to the Court of the Sessions Judge of Cawnpore where a number of points, which do not appear to have been taken in the trial Court, were taken. The learned Sessions Judge held that the story of the cloth being found under the sacks was correct. He further held that the applicant had failed to maintain correct accounts. In this connection he remarked that it had been argued that the cloth, Exs. 16 to 92, had been included in the report, Ex. P-4, made to the District authorities on 2-7-1945 and, therefore, its absence from the account book, that is, the 'rokar bahi', was unimportant. About this he said:

"This argument is bound to fail because according to the defence Exs. 16 to 92 were not included in the books as they were not part of the trade stock; therefore, they could not have been included in Ex. P-4 either. I do not think Ex. P-4 clearly shows that any stock not shown in the account books was included in the return; it merely gives a figure for the stock held on 2nd July without other details. There is no proof that it covers any of the exhibits for which the appellants have been tried; if it does cover any of them, they can only be Exs. 1 to 15 according to the defence."

This view is clearly correct and the only argument which has been put forward to meet it is one which will be dealt with in its proper place and is completely unconvincing.

[8] The second main argument put before the learned Sessions Judge raised the point for the consideration of which the present application (though as I think wrongly) was referred to this Full Bench, namely, the correct interpretation of R. 119, Defence of India Rules. As I have mentioned already, R. 81 provides for the making of orders providing for various matters. There are numerous other rules which empower the Central Government or the Provincial Government to make orders. By some of these rules the Government is to make an order by notification. In others there is no such provision for the publication or communication of the order made by the Government or by the authority which is authorised to make the order. For these, R. 119, Defence of India Rules, provides. This rule has been the subject of a number of amendments, but at the dates of the issue of the Cotton Cloth and Yarn Control Order and of the amendment which introduced 6-a it ran as follows:

"Save as otherwise expressly provided in these Rules, every authority, officer or person who makes any order in writing in pursuance of any of these Rules shall, in the case of an order of a general nature or affecting a class of persons, publish notice of such order in such



manner as may, in the opinion of such authority, officer or person, be best adapted for informing persons whom the order concerns, . . . and thereupon the persons concerned shall be deemed to have been duly informed of the order."

[9] As has been said by some learned Judges, the rule provides something in the nature of an exception to the general rule *ignorantia legis non excusat*; but only to this extent that it provides in effect that unless and until there has been publication of notice of an order (for example an order under R. 81 (2)) no one can be punished for a breach of the order. It does not, however, require that any given person should have actually been informed of the order and should have actual knowledge of it. On the contrary, after publication of the order the persons concerned, that is those whom the order concerns, shall be "deemed" to have been duly informed of the order. In the case of an order affecting an individual person (not being a corporation or firm, for which there is a separate provision) the rule provides that the authority shall serve or cause the order to be served on that person:

"(i) personally, by delivering or tendering to him the order, or,

(ii) by post, or

(iii) where the person cannot be found, by leaving an authentic copy of the order with some adult male member of his family or by affixing such copy to some conspicuous part of the premises in which he is known to have last resided or carried on business or personally worked for gain,

and, thereupon, the person concerned shall be deemed to have been duly informed of the order."

Rule 119 is thus a composite rule providing for publication in the case of an order of a general nature or affecting a class of persons and for personal service or some kind of substituted service in the case of an individual. Thus looked at as a whole, the rule clearly aims at securing that persons concerned with an order shall get either direct or constructive notice of the order.

[10] Different High Courts in this country have taken different views of the nature and effect of the provisions of R. 119. The view to which I am personally rather inclined is that R. 119 is procedural, if I may say so, and that the only object of the rule is to secure either direct or constructive notice of the order to the person or persons concerned, and that the validity of the order is not affected at all by the rule. What is affected by the rule—R. 119—is the operation of the original order in the sense that in the absence of communication, direct or constructive, a breach of the order cannot be made punishable. That view has not found general favour and the view more generally taken is that the provisions of R. 119 are mandatory and it is generally said that an order which has

been made is not law at all and in fact is not binding on any one unless and until there has been publication as required by R. 119. Further to this, a number of Courts have taken the view that the words

"shall publish notice of such order in such manner as may, in the opinion of such authority, officer or person, be best adapted for informing persons whom the order concerns"

should be interpreted very strictly so as to throw a burden on the prosecution in cases of alleged breach of any such order to prove, first, that the authority which passed the order formed an opinion and decided the manner best adapted for informing persons whom the order concerns, secondly, that in pursuance of that opinion and decision it directed such publication and thirdly, thinks that such publication was made in exact accordance with the direction given by the authority, officer or person on the basis of the opinion which he was proved to have formed. It will be noted that the matter so regarded becomes one of the most petty-fogging technicality and goes far beyond any principles of commonsense. It will, however, be convenient to note the history of these various views as shown by decisions of our own and other Courts.

[11] Our attention has been drawn to two cases decided by Mulla J. in 1945, 1945 A. L. J. 182<sup>3</sup> and 1945 A. L. J. 357.<sup>4</sup> It will be convenient to quote the headnotes. In the first case the headnote runs as follows:

"No order passed by the District Magistrate under the Defence of India Rules can have any legal effect until notice of that order has been duly published as required by R. 119, Defence of India Rules. Rule 119 incorporates a mandatory provision which must be strictly carried out."

Reliance was placed on a decision of the Nagpur High Court, I. L. R. (1944) Nag. 150.<sup>5</sup> In the second case the headnote runs as follows:

"The most important ingredient of R. 119, Defence of India Rules is that it is for the authority passing the order to exercise its mind and to decide upon some method of publication. This power cannot be exercised by anyone other than the authority passing the order. Before a person can be charged with infringement of an order passed under the Defence of India Rules, it is incumbent on the prosecution to establish that the authority passing that order had prescribed a certain method of publishing that order and that method had been carried out."

[12] In the second of these two cases, I should like to note that at one stage of the argument Mulla J. was prepared to assume for the purposes of argument that it was under the District Magistrate's direction (as indicated by certain details endorsed on the order of the District Magistrate) that copies of his order were sent to various officers for consideration. In the result, however, he took the view that the mere fact that copies of the order were sent to various officers in accordance with these endorsements



was not sufficient to fulfil the requirements of the law and there was no proof in fact that the District Magistrate had prescribed the method of publication. Personally I am inclined to the view that where an order of any District Magistrate is sent out from the District Magistrate's office to a number of different authorities for publication, it is a reasonable presumption that this was done under the orders of the District Magistrate himself. An authority, officer or person who makes an order under the Defence of India Rules is presumed to have the provisions of R. 119 in his mind and, when he wants publication, to make a direction after a consideration of what is necessary in the circumstances of the case. These were, however, cases of orders made by District Magistrates. The case of an order made by the Provincial Government was for the first time considered by my brother Wali Ullah in 1945 A. L. J. 499.<sup>6</sup> It will be convenient to quote the headnote which runs as follows :

"The provisions of R. 119, Defence of India Rules necessitate proof of two matters : (1) it must be shown that the authority making the order—in the case in question the Provincial Government—indicated some manner, which in its opinion was considered best adapted for informing the persons concerned ; and (2) that such direction given by the authority concerned was actually carried out. Where there is no indication whatsoever that the authority making the control order ever even applied its mind to the consideration of this rule in regard to the publication or notification of the order in question, then the mere publication in the Official Gazette cannot be held to comply with the provisions of R. 119. The presumption, therefore, that the person concerned must be deemed to have been duly informed of the order does not arise.

Where the accused pleaded ignorance of the U. P. Cattle, Sheep & Goats (Slaughter) Control Order, 1943 it was established that the Control Order in question was not published in accordance with the provisions of R. 119, Defence of India Rules, *held*, that the accused could not be convicted for any contravention of the Control Order."

[13] In this judgment the matter was discussed at some length and reliance was placed on the same Nagpur case in I.L.R. (1944) Nag. 150<sup>6</sup> mentioned earlier. The most important passage in the Nagpur judgment is that quoted in this judgment at page 501 which runs as follows :

"This rule (119) lays an obligation on the officer making the order to *publish notice* of such order. The manner in which such notice is to be published is no doubt left to the discretion of that officer. If he adopts a mode of publication however inadequate or unreasonable, it is not liable to be questioned in any Court of law. (It may be noted that other Courts do not at all accept this proposition.) But the burden of proving publication of the notice of that order in the manner contemplated by the officer making the order lies on the prosecution. In other words, it must be shown that the officer making the order himself prescribed the manner of its publication and that the publication was made in that manner. The obligation laid on the officer passing the order is a statutory obligation and it is incumbent on the prosecution to prove that the statutory obligation was duly

discharged. The prosecution cannot in such a case merely rely on the presumption of S. 114, cl. (e), Evidence Act, for the only reason that the making of the order and the direction to publish notice of it were official acts."

[14] I would remark here that it is a peculiar feature of the decision in I.L.R. (1944) Nag. 150<sup>6</sup> that the application in revision was ultimately dismissed on the ground that it had not been proved that the publication was not made in complete accordance with the direction of the officer passing the order. I would also like to remark that there is no such thing as cl. (e) of S. 114. What the learned Judge was referring to was illustration (e) and, in my judgment, the illustrations in S. 114, Evidence Act, are nothing but illustrations and it is always open to a Court to go back to the main section and consider whether that section, as it stands, is applicable to any given set of facts so as to enable the Court to draw inferences from those facts. The same view is said to have been taken by Sinha J. in another unreported case of a Magistrate's order in Cri. Ref. No 1161 of 1945.<sup>7</sup> By the time the matter came before the Court again on 4th April 1946 in 1946 A. W. R. 432,<sup>8</sup> the question had been considered by a Full Bench of the Patna High Court in I.L.R. (1945) Pat. 781 : A. I. R. 1946 Pat. 1<sup>9</sup> in which the first headnote runs as follows :

"It is a well-known practice of the Central and Provincial Governments to publish their Acts and Notifications in their Official Gazettes. Therefore when an order passed by the Central or Provincial Government is published by it in the Official Gazette, it may be presumed that the Government, while publishing the order, was aware of the provisions of R. 119 (1) and the publication was made in compliance with all its provisions including the provision as to the determination of the most suitable form of publication "

[15] I took the view that I was justified by this decision in differing from the view taken by my brother Judge and accordingly rejected the reference. A month later, on 9-5-1946, the proper interpretation of R. 119 was considered by a Division Bench consisting of the late Sir Iqbal Ahmad C. J., and Braund J., in 1946 A.W.R. 428.<sup>2</sup> It will again, I think, be sufficient to quote the first headnote which runs as follows :

"When an order passed by the authority has been published by it in the Official Gazette, it may be presumed that it was aware of the provisions of R. 119, Defence of India Rules and that the publication in the Gazette was made in considered compliance with all its provisions, including the provision as to the determination of the most suitable form of publication. There is nothing in R. 119 which required the authority to set out what its opinion was or how it was arrived at "

This part of the headnote is a quotation from the Patna case. The headnote continues :

"If a principle were to be introduced that, wherever, by statute or rule, a discretion is reposed in any person to do an act, he had to prove affirmatively his mental processes in exercising discretion, it would lead to impossible results. Nor is it in accordance with well accepted legal principles. There is great difficulty in



understanding why, once the act of publication itself has been proved, it should not, in conformity with S. 114, Evidence Act, be presumed that the official process of considering and forming an opinion as to the best method of publication has been regularly performed." It is this paragraph which sums up the conclusions of the Division Bench.

[16] The last case of this Court to which our attention has been drawn is the decision of Sinha and Mansur Alam JJ., in Criminal Revn. No. 1269 of 1945 connected with Nos. 1270 to 1282<sup>1</sup> in which a reference was made to 1946 A. W. R. 428.<sup>2</sup> In their judgment in this case the learned Judges referred to the fact that the publication provided by R. 119 is itself a departure from the principle of law embodied in the maxim *ignorantia legis non-excusat* and they went on to refer to an English case (1918) 1 K. B. 101,<sup>10</sup> where a distinction was drawn between an ordinary law enacted by Parliament after due publicity and the Defence of the Realm Regulations. The learned Judge remarked that there was about statutes a publicity even before they come into operation, which was absent in the case of many Orders such as that with which the Court was then dealing and, indeed, if certain Orders were to be effective at all, it was essential that they should not be known until they were actually published. He therefore said that he was unable to hold that the order came into operation before it was known, that is to say, before the morning of 17th May. I have been unable to find that this decision has any real bearing. We have to interpret our own rules and cannot get much help from rules which, were differently framed and in respect of which so far as appears, there was no such provision as R. 119. Even as the remarks of the learned Judge were worded, he would have had to hold that the order was in operation as soon as it was known to the offender even if it was before the publication of the order in the ordinary way. Be that as it may, the attention of the learned Judges of this Court was then drawn to the decision in 1946 A. W. R. 428<sup>2</sup> and they remarked that that authority did not affect the case before them and that all it decided was that the publication in the Gazette was a good publication and it was not necessary for the prosecution to prove that it was made in a manner which was proper in the opinion of such authority, officer or person. They went on to say :

"We shall assume that the Governor or the Secretary of the Department concerned directed its publication and that it was done in the manner prescribed. But the object of the publication is mentioned in the rule itself. It is intended for 'informing persons whom the order concerns.' It is still open to the applicants to contend that, even if there was a publication, the Gazette never reached them. Once it has reached them and conveyed the necessary information, it is not open to them to take exception to the manner or method in

which the information was conveyed, but the receipt of the information is a *sine qua non*."

They went on to hold that these persons were not guilty of the breach of the order of 21st April 1943 because they received the information on the testimony of one of the prosecution witnesses himself only on 5th May 1943.

[17] It seems to me evident that this decision was not in conflict with the decision in 1946 A. W. R. 428.<sup>2</sup> With the greatest respect I am, however, quite unable to accept the view expressed in the last paragraph. Admittedly, at the date in question, R. 119 was in force in the form in which I have quoted it earlier and it was not necessary for the prosecution to prove actual information, that is actual communication, to the alleged offenders. Once publication had been made the persons affected by the order were to be deemed to have been informed and, in my judgment, when a person is deemed to have been informed, it is not open to him to show that he was not actually informed. Rule 119 lays down, as I have said earlier, that there may be either actual information or constructive information and either is equally effective.

[18] We have been asked by Mr. Pearey Lal Banerji to re-consider the decision in 1946 A. W. R. 428<sup>2</sup> in the light of some decisions of other High Courts. Reliance was placed on the Nagpur case, I.L.R. (1944) Nag. 150.<sup>6</sup> In that case reliance was first of all placed on the analogy of English law and the case in (1918) 1 K. B. 101.<sup>10</sup> The learned Judge took the view that an order passed by a District Magistrate under R. 81 could not bind the persons concerned unless it was published in accordance with R. 119, Defence of India Rules. The learned Judge seems to have taken the view that the presence of an endorsement below the order itself implied that there was a direction by the District Magistrate after the District Magistrate had decided upon the method best adapted for publication. He then turned to the question whether there could be any presumption that publicity was actually given in accordance with the direction. But in this connection he concluded that as that point, which was a point of fact, had not been raised in the trial Court and the witness who could have given evidence on the point was not cross-examined, the applicant accused could not be allowed to take advantage of his own default and it must consequently be held that wide publicity as contemplated by the District Magistrate was given and the applicant had in point of law notice of the District Magistrate's order. The conviction was accordingly upheld.

[19] In a subsequent Bench case of the Nagpur High Court, I.L.R. (1945) Nag. 382,<sup>11</sup> it was held that :



"The provisions of R. 119, Defence of India Rules are mandatory and not directory, and failure of service of notice of an order of detention in the manner prescribed under R. 119 Defence of India Rules makes a detention under R. 26 (1) (b), Defence of India Rules illegal, and when an ineffective and inoperative order passed under R. 26 (1) (b), Defence of India Rules is sought to be continued by the passing of a fresh order under S. 9, Restriction and Detention Ordinance, there is no legal order of detention under the Defence of India Rules."

[20] The argument in this case was to the effect that R. 119 is intended to give information to the person concerned so that the person be fixed with a knowledge that an order has been passed against him. It was remarked that this was an order directing that a particular person be detained and was not therefore an order to which R. 119 applied in terms. None the less, the view was taken that an order passed, while a person was already in detention under another order, was not legal because of the absence of service. With the greatest respect, I find great difficulty in accepting this view. The whole point of R. 119 is to saddle a person with knowledge, direct or constructive, in order that that person may be liable to punishment if he commits a breach of the order. The information or communication really serves no other purpose and if in fact the person concerned in this particular case was of opinion that he was being detained without there being any legal order for his detention, the natural course was for him to move the Court by an application under S. 491, Criminal P. O. at once. The applicant waited from 1942 until 1944 and it was only on receipt of the order dated 23-6-1944 on 4-7-1944 directing that the order made on 16-11-1943 would continue that he claimed to have received notice of the detention order of 16-11-1943. It does not seem to me that there is anything in this case which can lead us to take a different view from that which has been taken by the Division Bench.

[21] Reliance was next placed on three Bombay cases. The first of these is 46 Bom. L. R. 495.<sup>12</sup> The Division Bench took the view that :

"Where an order is addressed to a private individual, it is difficult to hold that mere publication of it in the local official Gazette is sufficient notice to that individual of an order passed against him, unless there is reason to believe that he is in the habit of reading the Gazette or has read it in a particular instance."

[22] This was a case of an order under R. 26 (5-B) (b), Defence of India Rules and if R. 119 applied to it at all, then that portion of R. 119 which refers to publication in the manner which the authority considers best adapted does not apply at all. Rule 119 itself contains provisions for service of notice addressed to an individual and the procedure mentioned therein does not include publication in the official Gazette. The learned Judges, however, went on to hold that :

"Where in fact the individual concerned knows perfectly well that an order has been passed against him and acquires his knowledge by other means, it cannot be said that he has not received notice of the order merely because notice is not given to him in the form prescribed by R. 119."

In effect the learned Judges adopted the view of R. 119 for which I have already indicated my own preference.

[23] The second Bombay case relied on by Mr. Banerji is A. I. R. 1945 Bom. 368.<sup>13</sup> This was a case of a Government order requiring the submission of weekly returns of stock of a shop in which, beside other articles, rice, wheat and bajri were sold. The notification requiring the submission of these returns was published in the Bombay Government Gazette. The point taken on behalf of the applicant to the High Court was that there was no evidence as to the manner which in the opinion of the authority issuing the order was best adapted for informing the persons whom the notification concerned, and, that being so, no presumption could arise under R. 119 (1) that the accused was duly informed of the said notification. To put it more accurately, the accused persons could not be deemed to have been duly informed of the said order. The learned Judges remarked that there was an entire absence of evidence as to how, in the opinion of the authority issuing the notification, the notification was to be published. They did not think that in a case of this nature recourse should be had to the provisions of S. 114, Evidence Act, and that any presumption arose that the issuing authority had decided that the notification was to be published in the Bombay Gazette alone. They went on to remark :

"As pointed out by Woodroffe J., in 32 Cal. 1107,<sup>14</sup> the meaning of S. 114, illustration (e), Evidence Act is that if an official act is proved to have been done, it will be presumed to have been regularly done and that it does not raise any presumption that an act was done of which there is no evidence and the proof of which is essential to the case."

[24] The learned Judges thus apparently took the view which has not been accepted in this Court that it cannot be presumed under S. 114, Evidence Act from the mere fact of publication in the Government Gazette that the officer who directed that publication is the same officer who made the order which was to be published or if it was the same, that he gave his mind to the consideration of the question whether that was the method best adapted for informing the persons concerned. With all respect, I see no reason (and, indeed, the learned Judges have not put forward any reasoning) to prefer this view to the one embodied in our Division Bench ruling. On the contrary, it seems to me that where an authority, *ex hypothesi* an official



acquainted with the Defence of India Rules, makes an order which again *ex hypothesi* he is aware should be published in the manner best adapted for informing the persons concerned, it is to be presumed that he must have given thought to the method of publication. It was suggested by Mr. Banerji that publication might have been more or less automatic, that is to say, that because it was a Government Order, it went into the official Gazette. But that seems to me to take the matter very little further. It is, of course, impossible to say who actually sent the order to the Government Gazette and it may well have been some one different from the officer who actually signed the original order either of his own motion or under the direction of the Governor himself. The authority—the Provincial Government—operates through different persons, the Governor, the Minister or under S. 93 the Adviser, the Secretary or the Deputy Secretary; but when an order is made by any of these, it is sent through ordinary channels to the official Gazette and the mere fact that it is sent on by the higher officer implies that it has to go through the lower ranks to the proper destination. To my mind, illustration (e) of S. 114, Evidence Act, covers the whole of the procedure which leads to the publication of a Government order under the Defence of India Rules in the Official Gazette, and there is nothing in this decision which could lead us to a different view.

[25] The only other Bombay case to which reference was made is A. I. R. 1945 Bom. 389,<sup>15</sup> and learned counsel has not been able to show us in what way it is applicable to the present case.

[26] To sum up, I find no force whatever in the contention of learned counsel that the only presumption which can be made under S. 114, Evidence Act is that some one, not necessarily the authority which made the order, decided on the best form of publication and ordered publication in the Official Gazette.

[27] I have not thought it necessary in the remarks I have made above to discuss the subsequent amendment by which R. 119 (1B) was added to the Defence of India Rules. By that amendment it was provided as follows :

"If in the course of any judicial proceedings a question arises whether a person was duly informed of an order made in pursuance of those Rules, compliance with sub-r. (1) or, in a case to which sub-r. (1A) applies, the notification of the order, shall be conclusive proof that he was so informed; but a failure to comply with sub-r. (1) :

(i) shall not preclude proof by other means that he was so informed; and

(ii) shall not affect the validity of the order."

[28] This amendment was made by a notification dated 21-7-1945 and it has been contended

by Mr. Banerji that it could not have retrospective effect. In my judgment, there is no question of retrospective effect because the amendment provides merely for a rule of evidence to be adopted in future judicial proceedings. The amendment as a whole merely has this effect that whereas under the order as it stood formerly compliance with sub-r. (1) had the result that the persons concerned were deemed to have been duly informed, compliance with sub-r. (1) now becomes conclusive proof that the person concerned was so informed. Provision (i) has this effect that even a person who before publication in the Gazette saw the completed and signed order on the table of the Secretary to Government and thereafter proceeded to contravene that order would be punishable for a breach of the order. Provision (ii), as it seems to me, goes no further than to support the view which I previously held that the publication or communication of the order and its validity are two entirely separate matters. The order itself when once it is signed is a perfectly good and valid order, but no one can be convicted for a breach of the order unless and until there has been a communication either direct or constructive by publication in accordance with the terms of sub-r. (1). In the light of the decision of the Division Bench, the applicant has not a leg to stand on. If it be considered that sub-r. (1) was still applicable, he is deemed to have been informed both of the original Cotton Cloth and Yarn Control Order and the amendment 6-a, and if sub-r. (1B) was applicable, then the admitted fact of publication, which I hold to be a compliance with sub-r. (1), is conclusive proof that he was so informed. I have already held at the beginning of this order that the failure of the applicant to enter these exhibits in his books did amount to a breach of R. 6-a. The applicant was, therefore, rightly convicted and there is no force in this application.

[29] Before I leave the case, I should perhaps remark that Mr. Banerji addressed to us an ingenious argument to the effect that, by the applicant's system of accounts, he did not enter any cloth received on invoice in his accounts until, at or before the expiry of the 15 days' time allowed by the local business custom, he paid his vendor for that cloth. This cloth having come in on 26th June was not yet due to be entered in the accounts. It will be sufficient to say that there is no evidence whatever on the record to support this alleged method of keeping accounts and, secondly, that that was not the applicant's case. On the contrary, he attributed his failure to enter Exs. 1 to 15 (and not Exs. 16 to 92) in his accounts to the fact that he was away from Cawnpore from



25th June to 4th July and from start to finish he claimed that as Exs. 16 to 92 were his private property collected for the purpose of the gauna ceremony, he never intended to enter these exhibits in his accounts at all.

[30] Finally on the question of sentence I agree with my learned brother that in the circumstances of this case the sentence of imprisonment may be reduced to the period already undergone.

[31] **Verma C. J.** — I agree with the order proposed by my brother Yorke. Mr. Pearey Lal Banerji argued the case with his usual ability, thoroughness and fairness and cited all the relevant decisions, reported as well as unreported. There is a clear conflict of judicial opinion, and it is undeniable that there are several decisions which support the contentions put forward by the learned counsel. Upon a careful consideration of the whole matter, however, I find myself in entire agreement with the decision of a Bench of this Court, consisting of Iqbal Ahmad C. J., and Braund J. in *Rai Bahadur v. Emperor*<sup>2</sup> which, we are told, has so far been published only in the Allahabad Weekly Reporter and is to be found at page 428 of the Volume for 1946. I should also like to place on record—if I may do so with respect—my sense of indebtedness to the very instructive judgment of Fazl Ali, C. J., in the Full Bench case in *I. L. R. (1945) Pat. 781*.<sup>9</sup>

[32] **Waliullah J.** — I also agree with the order proposed by my learned brother, Yorke J. As I was responsible for the decision in 1945 A. L. J. 499,<sup>6</sup> I should like to mention that the question of a presumption under S. 114, Evidence Act was neither specifically raised by the counsel for the parties nor was discussed by me in the judgment. However, on a full consideration of the whole matter, particularly in the light of the Bench decision of this Court in 1946 A. W. R. 428,<sup>2</sup> and the Full Bench decision of the Patna High Court in 24 Pat. 781,<sup>9</sup> I feel satisfied that the publication of the control order in the official Gazette gave rise to the presumption under S. 114, Evidence Act that the provisions of R. 119 (1), Defence of India Rules, including the provision for determining the most suitable form of publication, were fully complied with.

[33] **Mootham J.** — I agree with the proposed order, and with the reasons therefor.

[34] **Mathur J.** — I also agree and have nothing to add.

[35] **By the Court.** — The application for revision is allowed only to this extent that the sentence of imprisonment is reduced to the period already undergone. The applicant need not, therefore, surrender to the bail allowed to him by the order made by this Court on 7-3-1946.

In other respects the application is dismissed. The sentence of fine and the sentence of imprisonment in default of the payment of the fine are maintained. The order made by this Court on 7-3-1946, staying the realisation of the fine imposed on the applicant, Debi Prasad, is hereby discharged.

D.S.

*Order accordingly.*

# **A. I. R. (34) 1947 Allahabad 199 [C. N. 94.]**

VERMA AND HAMILTON JJ.

*Sheo Shanker Bhatt and another—Defendants — Appellants v. Moti Lal Selhat and another — Plaintiffs — Respondents.*

First Appeal No. 83 of 1943, Decided on 11-1-1946, from decision of Civil Judge, Benares, D/- 25-9-1941.

Limitation Act (1908), S 19 — Acknowledgment made beyond prescribed period but within period to be excluded under local or special Act does not fall under S. 19.

An acknowledgment which is given not within the period of limitation prescribed by Sch. 1, Limitation Act, but within a period which is to be excluded under a local or special Act, is not an acknowledgment within the meaning of S. 19 and does not give a fresh starting point of limitation: 25 A. I. R. 1938 All. 217 (F.B.), *Foll.*; 22 A. I. R. 1935 P. C. 85, *Explained and Distinguished*; 25 A. I. R. 1938 Mad. 19 and 24 A. I. R. 1937 Oudh 26, *Not followed*. [Paras 2, 4]

Limitation Act—('42-Com.) S. 19, N. 12, Pt. 6a.

*Walter Datt, P. N. Haksar and A. K. Kirtly —*  
for Appellants.

*A. Sanyal —* for Respondents.

*Cases referred:—*

1. ('38) I. L. R. (1938) All. 363 : 25 A. I. R. 1938 All. 217: 175 I. C. 556 (F.B.), *Shankar Lal v. Rana Lal*.
2. ('35) 57 All. 242 : 22 A. I. R. 1935 P. C. 85 : 62 I. A. 80 : 155 I. C. 205 (P.C.), *Maqbul Ahmad v. Onkar Pratap Narain Singh*.
3. ('38) I. L. R. (1938) Mad. 439 : 25 A. I. R. 1938 Mad. 19 : 176 I. C. 321, *Sambayya v. Pedda Subbayya*.
4. ('37) 12 Luck. 531 : 24 A. I. R. 1937 Oudh 26 : 165 I. C. 269, *Sukhnandan Prasad v. Ahmad Ali Khan*.

**Verma J.**—This is an appeal by the defendants in a suit for the recovery of Rs. 9025. The Court below has granted the plaintiffs a decree for Rs. 7700 with proportionate costs and future interest at three per cent. per annum. It appears that the plaintiffs agreed in the Court below that the suit should be decreed for Rs. 7700 only and that the defendants also accepted the correctness of this figure and stated that a decree might be passed for that amount if their plea of limitation was not accepted.

[2] The suit, which was instituted on 26th September 1941 (and not 18th November 1941, as stated in the judgment of the Court below), was based on a Sarkhat dated 16th September 1933. The plaintiffs alleged that their suit was saved from the bar of limitation because of two reasons, (1) that the period from 5th August 1936 to 30th September 1939, had to be excluded because of proceedings taken by some of the debtors under



the United Provinces Encumbered Estates Act, and relied on S. 9 (5) of that Act and (2) that there was an acknowledgment of the debt by the present defendants-appellants in a written statement filed in those Encumbered Estates Act proceedings on 21st September 1939. The defendants-appellants agreed that the plaintiffs were entitled to the exclusion of the period from 5th August 1936 to 30th September 1939, in other words, that the plaintiffs could bring a suit on the basis of this Sarkhat upto 11th November 1939. They contended, however, that, as the acknowledgment relied upon had been given, not within the period of three years prescribed by Sch. 1, Limitation Act, but within a period which was to be excluded under a local or special act that acknowledgment was not an acknowledgment within S. 19, Limitation Act and that, therefore, the suit was barred by time. The Court below overruled this contention of the defendants.

[3] The only question that arose in the Court below, and that has been argued before us, is the question of limitation. On behalf of the appellants reliance has been placed on the Full Bench decision of this Court in I. L. R. (1938) ALL. 363.<sup>1</sup> That decision is entirely in their favour. Learned counsel for the plaintiffs-respondents has contended, however, that it required reconsideration because it runs counter to the decision of their Lordships of the Privy Council in 57 ALL. 242,<sup>2</sup> and has emphasised that in the judgment of the Full Bench in I. L. R. (1938) ALL. 363,<sup>1</sup> the Privy Council case has not been mentioned, although it had been decided three years earlier. The argument is that, as their Lordships of the Privy Council observed in their judgment that the period which has to be excluded under S. 14, Limitation Act has to be added to what is primarily the period prescribed by Sch. 1, Limitation Act, the period which has to be excluded under S. 9 (5), U. P. Encumbered Estates Act must also be deemed to be on the same footing as a period which has to be excluded under S. 14, Limitation Act. It appears to us that this contention is not well-founded. In the first place, even though the case in 57 ALL. 242<sup>2</sup> does not appear to have been cited before the learned Judges who decided the case in I. L. R. (1938) ALL. 363,<sup>1</sup> they do make observations which indicate the grounds on which they would have held that the decision of the Privy Council was not applicable to the facts of the case before them. At p. 366 of the report they observed as follows:

"The question before us is, therefore, whether an acknowledgment made after the expiry of the prescribed period, but during an excluded period—excluded by a special and local Act—can form an acknowledgment to extend limitation under S. 19, Limitation Act."

and at p. 370, at the end of their judgment, they stated their conclusion thus:

"The conclusion, therefore, is that S. 19 cannot apply to an acknowledgment made after expiry of the period of limitation prescribed but during the period excluded by S. 52, U. P. Court of Wards Act, Act 4 [IV] of 1912."

It has thus been clearly held by the Full Bench that—whatever may be the position when a certain period has to be excluded under one of the sections of the Limitation Act—a period which has to be excluded under any other enactment does not stand on the same footing. The words in S. 19, Limitation Act, are "before the expiration of the period prescribed". This must, in our opinion, mean prescribed by the Act in which S. 19 occurs, that is, the Limitation Act, read by itself and without reference to any other enactment. The observations of their Lordships of the Privy Council in 57 ALL. 242,<sup>2</sup> relied upon by the plaintiffs-respondents, were made with reference to a section of the Limitation Act itself and learned counsel for the plaintiffs-respondents has failed to convince us that we shall be justified in holding, on the basis of those observations, that the Full Bench decision in I. L. R. (1938) ALL. 363<sup>1</sup> requires reconsideration. It may also be pointed out that S. 3, Limitation Act, makes it incumbent on the Court to dismiss every suit instituted after the period of limitation prescribed therefor by Sch. 1, and the only exception is contained in the words "subject to the provisions contained in ss. 4 to 25 (inclusive)." That also indicates that, where a plaintiff, instituting a suit after the period prescribed by Sch. 1, Limitation Act, seeks to take advantage of an enactment other than the Limitation Act, he is not entitled to contend that his suit is outside the mischief of S. 3.

[4] Learned counsel for the plaintiffs-respondents has also cited the cases in I. L. R. (1938) Mad. 499<sup>3</sup> and 12 Luck. 531.<sup>4</sup> The question in the latter case had also arisen as to a period excluded by S. 52, U. P. Court of Wards Act and the decision there is just the reverse of what the Full Bench of this Court subsequently decided in I. L. R. (1938) ALL. 363.<sup>1</sup> No reasons, however, are given by the learned Judges of the Chief Court for the conclusion. The whole of the judgment on this point is contained in two sentences which run thus:

"In this way a suit on the basis of the earlier promissory note would have been in time upto 16th August 1932, and a suit on the second promissory note would have been in time up till 30th August 1932. The letter (Ex. 19) and the post card (Ex. 18) were, therefore, written before the period of limitation for a suit on the promissory notes had expired."

There was no consideration of the language of the relevant sections of the Limitation Act. That a suit would have been in time upto a certain



date does not necessarily lead to the conclusion that an acknowledgment given before that date, but after the expiration of the period laid down in Sch. 1, Limitation Act, is a good acknowledgment within the meaning of S. 19, Limitation Act. In the former case, the learned Judges of the Madras High Court did interpret the observations of their Lordships of the Privy Council in 57 ALL. 242<sup>2</sup> as laying down that the word "prescribed" in S. 19, Limitation Act, is not limited to the period mentioned in Sch. 1 of the Act and that, in computing the period prescribed, the period which a party is entitled to exclude under any law for the time being in force should be taken into account. We do not, however, think, as has already been stated, that the Privy Council decision, which was concerned with the interpretation of S. 14, among other sections of the Limitation Act, adversely affects the decision of the Full Bench of this Court in I. L. R. (1938) ALL. 363<sup>1</sup> which was a case in which the exclusion had to be made under an enactment other than the Limitation Act. That decision is binding on us and we must, therefore, hold that the Court below was wrong in coming to the conclusion that the suit was saved from the bar of limitation.

[5] Learned counsel for the plaintiffs-respondents has also argued that the proviso to S. 9 (5), U. P. Encumbered Estates Act, must be deemed to be incorporated in the Limitation Act and must be treated as one of the provisions contained in that Act. We do not think that there is any justification for this contention.

[6] The appeal must be allowed and it must be held that the suit brought by the plaintiffs-respondents was barred by time. We accordingly allow the appeal, set aside the decree passed by the Court below and dismiss the suit with costs in both Courts.

N.S.

*Appeal allowed.*

[C. N. 95.]

**\*\* A. I. R. (34) 1947 Allahabad 201  
FULL BENCH**

YORKE, MALIK AND WALI ULLAH JJ.

*Mohd. Yasin — Plaintiff — Appellant v.  
Rahmat Ilahi — Defendant — Respondent.*

Second Appeal No. 1286 of 1943, Decided on 18-12-1946, from decision of Civil Judge, Bijnor, D/- 3-5-1943.

**\*(a) Muhammadan law—Waqf — Hanafi law — Waqf, creation of — Mere declaration by waqif is sufficient — Delivery of possession of properties to mutwalli is not necessary : 15 All. 321, *OVERRULED*.**

*Per Full Bench.*—According to the Hanafi School of Muhammadan law, in order to create a valid wakf, a mere declaration by the waqif is sufficient and it is not necessary for the completion of the wakf that the person appointed mutwalli under it should be given

possession of the dedicated properties : 15 All. 321, *OVERRULED*; 20 Cal. 116 (F. B.), *Expl.*; *Case law discussed.* [Paras 16, 18, 20 and 28]

**(b) Practice—Precedents — Stare decisis — Principle of — Applicability.**

The principle of *stare decisis* is applicable only where the effect of departing from an established rule of decision will be to unsettle transactions which have been previously supposed to be finally settled. That principle does not come into operation where the result of departing from an incorrect view of law is merely this that in disputes on subjects to which the law applies a new set of defences will be put forward in the Courts : 8 A.I.R. 1921 Cal. 15 (S. B.); 2 A.I.R. 1915 P. C. 127 and 3 A. I. R. 1916 P. C. 182, *Ref.* [Paras 17 and 29]

**(c) Muhammadan law — Hanafi law — General rules as to interpretation — Difference of opinion between the three masters — Rule of preference — No inflexible rule that Abu Yusuf's view is entitled to preference.**

*Per Malik J.* — Rules of preference as between the three masters of the Hanafi School of Muhammadan law, namely, Abu Hanifa and his two disciples Imam Muhammad and Abu Yusuf, were for the guidance of ancient jurists and are of no help where there is a clear preponderance of authority in support of one view. It cannot be laid down as a general proposition that the view of Abu Yusuf is entitled to preference when the three Imams have given different opinions on a particular point : 20 A. I. R. 1933 All. 634, *Rel. on*; 8 All. 149 (F. B.), *Ref.* [Para 18]

*Per Wali Ullah J.*—There are no fixed and inflexible rules of interpretation when there is a difference of opinion among the three masters on a particular point. The subsequent history of the conflicting opinions expressed by the masters and particularly the views held by later doctors regarding the correctness or otherwise of these opinions will, generally speaking, be of much greater importance : 20 A. I. R. 1933 All. 634, *Ref.* [Para 22]

*Cases referred :—*

1. ('93) 15 All. 321, Mahomed Aziz Uddin Ahmad Khan v. Legal Remembrancer to Government.
2. ('93) 20 Cal. 116 (F. B.), Bikani Mia v. Shuk Lal Poddar.
3. ('27) 49 All. 391 : 14 A.I.R. 1927 All. 255 : 99 I. C. 1052, Mubammad Shafi v. Muhammad Abdul Aziz.
4. ('22) 49 Cal. 477 : 9 A. I. R. 1922 Cal. 429 : 67 I. C. 77, Ginjira Khatun v. Mahomed Faqirulla Mia.
5. (1838) 1838 Fulton 345 : 1 I. D. 848, Doe Dem Jaun Bibi v. Abdullah.
6. ('90) 17 Cal. 498 : 17 I. A. 28 : 5 Sar. 476 (P. C.), Mahomed Ahsanulla v. Amarchand Kundu.
7. ('86) 8 All. 149 (F. B.), Abdul Kadir v. Salima.
8. ('21) 43 All. 487 : 8 A. I. R. 1921 All. 103 : 62 I. C. 896, Muhammad Yunis v. Muhammad Isbaq Khan.
9. ('21) 19 A. L. J. 227 : 8 A. I. R. 1921 All. 165 : 43 All. 416 : 62 I. C. 725, Abdul Jalil Khan v. Obedullah Khan.
10. ('38) 1938 A. L. J. 727 : 25 A. I. R. 1938 All. 485 : 177 I. C. 205, Mt. Alimunnisa Bibi v. Mahomed Abdur Rahman.
11. ('30) 1930 A. L. J. 109 : 17 A. I. R. 1930 All. 169 : 52 All. 368 : 123 I. C. 369, Ghazanfar Husain v. Mt. Ahmadi Bibi.
12. ('69) 12 W. R. 344, Khaja Husain Ali v. Hazara Begum.
13. ('69) 12 W. R. 498, Hazaree Begam v. Khaja Husain Ali.
14. ('24) 2 Rang. 495 : 12 A. I. R. 1925 Rang. 71 : 88 I. C. 167, Ma E Khin v. Maung Sein.



15. ('29) 8 Pat. 484 : 16 A. I. R. 1929 Pat. 410 : 117 I. C. 638, Mahomed Ibrahim v. Bibi Mariam.
16. ('35) 16 Lab. 432 : 22 A. I. R. 1935 Lah. 626 : 159 I. C. 250, Mahomed Said v. Mt. Sakina Begam.
17. ('37) I. L. R. (1937) 18 Lah. 276 : 24 A. I. R. 1937 Lah. 552 : 172 I. C. 37, Zafar Husain v. Mahomed Ghias Uddin.
18. ('38) I.L.R. (1938) Mad. 148 : 24 A.I.R. 1937 Mad. 731 : 173 I. C. 699, Kutti Umma v. Nedungadi Bank Ltd. Calicut.
19. ('12) 14 I. C. 988 (Bom.), Abdul Rajak v. Jimbabai.
20. ('20) 57 I. C. 991 : 7 A. I. R. 1920 Bom. 152, Husseinbhai Cassimbhai v. Advocate-General, Bombay.
21. ('36) 11 Luck 735 : 23 A. I. R. 1936 Oudh 213 : 160 I. C. 495 (F.B.), Mt. Rahiman v. Mt. Faqridan.
22. ('33) 55 All. 743 : 20 A. I. R. 1933 All. 634 : 148 I. C. 26, Anis Begam v. Mahomed Istafa Wali Khan.
23. ('92) 14 All. 429 (F.B.), Agha Ali Khan v. Altaf Husan Khan.
24. ('98) 25 Cal. 9 : 24 I. A. 196 : 7 Sar. 199 (P. C.), Agha Mohammad Zaffar v. Koolsum Bibi.
25. ('46) 33 A. I. R. 1946 All. 468 : 227 I. C. 50, Mahomad Imdad Ullah v. Mt. Bismillah.
26. ('21) 48 Cal. 184 : 8 A.I.R. 1921 Cal. 15 : 58 I. C. 353 (S. B.), Chandra Binode v. Ala Bux.
27. (1915) 1915 A. C. 1100 : 2 A.I.R. 1915 P. C. 127 : 84 L. J. P. C. 234 : 31 T. L. R. 590 (P.C.), Pate v. Pate.
28. ('17) 19 Bom. L. R. 450 : 3 A.I.R. 1916 P. C. 182 : 44 Cal. 759 : 44 I. A. 65 : 39 I. C. 156 (P. C.), Tricomdas Cooverji v. Gopinath Jiu Thakur.

*Inam-ullah* — for Appellant.

*C. B. Agarwalla* — for Respondent.

**Yorke J.**—This Full Bench reference arises out of a suit for possession of certain property on behalf of a mosque known as Hazrat Shah Wali in the town of Nagina in the Bijnor district on the allegation that the plaintiff was the owner of this property by reason of a deed of waqf executed on 11-5-1939 apparently by one Maula Bakhsh, father of the defendant Rahmat Ilahi. The main contention put forward on behalf of the defendant was that no waqf had been validly created inasmuch as the plaintiff mosque had never obtained possession of the property. The trial Court, the Munsif of Nagina, held that possession of the dedicated property had been given by the waqif Maula Bakhsh to the mutwalli of the mosque and therefore the waqf was not invalid on the ground of failure to give possession.

[2] In the lower appellate Court the Civil Judge of Bijnor has held that possession was never given to the plaintiff mutwalli and that the waqf was for that reason invalid and could not now be enforced. The appeal was therefore allowed and the plaintiff's suit dismissed.

[3] It is against this decree that the plaintiff came in second appeal to this Court and put forward the contention that under the Hanafi law it was not necessary for the completion of the waqf that the person appointed mutwalli under the waqf should be given possession of the property and the mere declaration of waqf was sufficient. The case came before one member of this Bench when it was not disputed that in the

light of the decision of this Court starting with the case in 15 ALL. 321<sup>1</sup> the learned Civil Judge, if he came to the conclusion that possession had not been delivered to the plaintiff, was bound to hold that the waqf was invalid. It was, however, pointed out that the view taken on this point by this High Court was at variance with the almost unanimous view of all the other High Courts in India including the other High Court in these provinces, that is, the Chief Court of Oudh. In these circumstances, it was thought desirable to refer the appeal to a larger Bench for consideration of the question whether the view taken by this Court in the earlier decisions was a correct view of the Hanafi law on the subject or not. On the matter being referred to a Bench of two Judges, it was felt that if such a Bench came to the conclusion that the view of the Hanafi law on the subject previously held by this Court was incorrect, the Bench would still not be in a position, properly speaking, to differ inasmuch as it would be a Bench of equal jurisdiction with the Benches which had previously expressed upon the point. The case was accordingly referred to the present Bench and we have been taken through the rulings of this High Court and a number of cases of other High Courts and have also considered the commentaries which deal with the matter.

[4] A number of cases of this High Court have been put before us. The first of these is the decision in 15 ALL. 321<sup>1</sup> to which we have referred above. The headnote runs as follows :

"According to the law of Sunni Mohammadans it is essential to the validity of a waqf that the waqif should actually divest himself of possession of the waqf property. Hence where a Sunni Muhammadan executed and registered what purported to be a deed of waqf, but never acted upon it and retained possession until his death of the property dealt with by the deed, which property subsequently passed to his two sons by inheritance : *Held*, that no valid waqf of the property mentioned in the said deed was constituted."

The question which the learned Judges put to themselves was : "Is this deed, as amongst Sunnis, so valid by virtue of its execution only that this action to compel the execution of the trust would lie ?" The learned Judges (Tyrell and Blair JJ.), remarked :

"We have been referred to authorities for the proposition that seisin, either formal or constructive, is essential to the validity of the waqf. The point is dealt with on p. 115 of the Tagore Lecture on Muhammadan Law, Part II, for 1874, where the author sums up in the following sentences : 'Thus the appropriation becomes valid, that is, absolute, according to the various opinions of the three great lawyers; according to Abu Hanifa, in consequence of the appropriator's declaration, and the Magistrate's subsequent decree; according to Abu Yusuf, by his simple declaration, and, according to Muhammad, by his declaration and delivery to a procurator. It passes out of the possession of the appropriator.'"



The learned Judges went on to quote from Hamilton's Hedaya on p. 232 of the 1870 Edition. We need not here refer to the view of Abu Hanifa but to the opinions of the disciples, Abu Yusuf and Muhammad. "Abu Yusuf" they say, "alleges that his (the appropriator's) right of property is extinguished upon the instant of his saying: 'I have appropriated' and such also is the opinion of Shafi, because that is a dereliction of property in the same manner as manumission. Muhammad says that it is not extinguished until he appoints a procurator and delivers it over to him; and decrees are passed upon this principle."

They then went on to refer to and base their decision on a then recent decision of the Calcutta High Court. They said:

"A case lately came before a Full Bench of the Calcutta High Court, 20 Cal 116,<sup>2</sup> in which the comparative authority of Abu Yusuf on questions of Muhammadan law amongst Sunnis is discussed, and the majority of the Full Bench decided that the authority of Abu Yusuf is to be postponed to that of Muhammad. This latter's exposition of the law which has just been cited supports the appellant's case."

They proceeded accordingly to find in favour of the appellant, holding that there never was a valid and operative waqf but an inchoate endowment only, which stopped short at the written and registered declarations of the defendant's father, from which he at once receded before he had put it out of his power to do so by divesting himself of the property.

[5] It has been observed by Sir Dinshah Mulla in his Principles of Muhammadan Law, 12th Edition 1944, at p. 25, para. 28, dealing with "General rules of interpretation of Hanafi Law": "that it is a general rule of interpretation of the Hanafi Law that where there is a difference of opinion between Abu Hanifa and his two disciples, Abu Yusuf and Imam Muhammad, the opinion of the disciples prevails where there is a difference of opinion between Abu Hanifa and Imam Muhammad, that opinion is to be accepted which coincides with the opinion of Abu Yusuf. When the two disciples differ from their master and from each other, the authority of Abu Yusuf is generally preferred."

In this connection he has referred in a footnote to a number of decisions of different High Courts and specifically he has referred to the case, 15 ALL. 321,<sup>1</sup> and remarked that:

"in this case it was held that the opinion of Imam Muhammad should be preferred to that of Abu Yusuf, the Court thinking (though erroneously) that it was so laid down by the Full Bench in 20 Cal. 116.<sup>2</sup>"

It may be noted in this connection that in a later case of this Court, 49 ALL 391,<sup>3</sup> at p. 394, Ashworth J. noted that in 20 Cal. 116<sup>2</sup> it was nowhere expressly stated that Imam Muhammad was to be preferred to Abu Yusuf. He remarked:

"I concur with the finding (of Pullan J.) on the ground that according to Imam Muhammad actual delivery of the waqf property to the mutwalli is a condition precedent of the waqf taking effect and on the ground that we have been shown no decision of this Court which dissents from the view expressed in 15 ALL. 321<sup>1</sup> that the authority of Abu Yusuf is to be

postponed to that of Imam Muhammad. This decision purports to follow a Full Bench decision of the Calcutta High Court in 20 Cal. 116.<sup>2</sup> I have examined that decision of the Calcutta High Court but cannot find that it expressly states that Imam Muhammad is to be preferred to Abu Yusuf, but indirectly this decision appears to have followed Imam Muhammad and there have been other decisions apparently preferring the authority of Imam Muhammad, even though they do not expressly state that he is a superior authority for this province to Abu Yusuf. The case has not been argued before us in a manner which would, I think, justify a refusal to follow the decision in 15 All. 321<sup>1</sup> or would justify our putting the matter up before a Full Bench of this Court."

What precisely was meant by this last remark does not appear.

[6] In these circumstances, I have thought it desirable to look more carefully into the decision in 20 Cal. 116<sup>2</sup> though before doing so I should note that it is clear that it has never been regarded in the Calcutta High Court as supporting the inference drawn from it by this High Court. In fact, in the subsequent case in 49 Cal. 477,<sup>4</sup> Mookerjee J., although he remarked that "In a recent case in the Allahabad High Court, 15 All. 321,<sup>1</sup> where the decision in 1838 Fulton 345,<sup>5</sup> was not brought to the notice of the Court, preference was given to the opinion of Imam Muhammad,"

made no reference to 20 Cal. 116<sup>2</sup> as an authority for that proposition and inconsistent with 1838 Fulton 345.<sup>5</sup> On the contrary he referred to a number of cases for the proposition that the rule enunciated in 1838 Fulton 345<sup>5</sup> had never been successfully challenged.

[7] Turning now to 20 Cal. 116,<sup>2</sup> the question at issue no doubt was the question of the validity of a waqf; but the specific question was of the validity of a waqf for the benefit of children, kindred or neighbours in perpetuity. The Full Bench consisted of five Judges, two of whom Prinsep and Trevelyan JJ. held that upon the findings of the lower Courts no second appeal lay, and it was not, therefore, necessary to express any opinion as to the validity of the instrument. Three Judges were of opinion that the instrument did not create a valid waqf, there being no substantial dedication to religious and charitable purposes. But a majority of the Full Bench nonetheless held that a charge created by the deed in question was valid. It is thus at once apparent that the question for decision was not the same question which was for decision in 15 ALL. 321,<sup>1</sup> and 20 Cal. 116,<sup>2</sup> therefore, can only be helpful in so far as it contains dicta upon the weight to be given to the opinions of the three Imams, Abu Hanifa, Abu Yusuf and Muhammad on a question of Hanafi law. The report contains a long statement of the authorities which were put before the Court and the arguments by which it was contended that the opinion of Abu Yusuf was to be preferred and in that con-



nexion reliance was placed on the case in 1838 Fulton 345.<sup>5</sup> The first judgment was pronounced by Ameer Ali J. and included in this judgment were quotations from numerous authorities, Fatawa Alamgiri, Radd-ul-Mukhtar, Fatawa Kazi Khan, Fath-ul-Kadir and numerous others. At p. 171 the learned Judge remarked :

"Before dealing with the case under reference, it seems to me necessary to clear away certain impressions regarding the respective opinions of Abu Hanifa, Abu Yusuf and Muhammad, which have formed the subject of elaborate arguments at the Bar. There is absolutely no difference between them as to the obligatoriness of a waqf or as to the validity of a waqf in favour of one's own or anybody else's family or descendants. The only dispute among them is (a) as to when and how it becomes binding and obligatory. Abu Hanifa thought a waqf to be revocable so long as the endower had not obtained the *imprimature* of the Kazi or 'death came upon him,' when it would become irrevocable. Abu Yusuf and Muhammad held that it was irrevocable, binding and obligatory (*lazim*) from the moment the consecration was made; but they differed as to how and when it should become operative. Abu Yusuf ruled that the waqf became binding upon the mere declaration of the dedication. Muhammad thought that it was not irrevocable until the property had been consigned to a mutwalli. With reference to these different views, Tahtawi says, 'no one has accepted the opinion of the Imam (Abu Hanifa), some few have followed Muhammad, but the universality of lawyers have adopted Abu Yusuf's rule.' The *Manah*, the *Fath-ul-Kadir*, etc., all say the *Fatwa* is with Abu Yusuf. The *Alamgiri* says that the lawyers of Balkh follow Abu Yusuf, and we (meaning the Indian Judges) decree accordingly.' I have given here the epitome of the dicta contained in the law-books, without burdening my judgment with quotations."

Further down the same page (172), after saying that there are three other points upon which Abu Yusuf and Muhammad differ and stating the points of difference, he says :

"As regards the other matters, Abu Yusuf ruled that 'the waqf of *Mushaa*' was valid, and that the endower could lawfully reserve for himself the usufruct or indeed 'make a waqf on himself,' and all the Mohammadan lawyers and Judges 'have followed Abu Yusuf.' In India 'the *fatwa*,' says the *Alamgiri*, 'is with Abu Yusuf.' And the British Indian Courts themselves have accepted and followed, under the guidance of their Law Officers, the rule of Abu Yusuf in (a), (b) and (c)".

(a) being the point referred to above as (a) and (b) and (c) the first two of the other three points.

[8] The second judgment was pronounced by Ghose J. He has quoted at considerable length from the authorities and at p. 185 has referred to Doe d Jaun Bibi's case,<sup>5</sup> decided in 1838. It is significant, so far as it relates to the decision of this Court in 15 ALL. 321,<sup>1</sup> that Ghose J., while quoting the questions put to the Moulavies of the Court in 1838 Fulton 345<sup>5</sup> and the answers given, did not even quote the second question, "Whether delivery of the property is essential to render an endowment valid, according to the rule which governs

other gifts?" Upon which the answer which the Moulavies gave was :

"Abu Yusuf does not consider the consignment and delivery of consecrated real property to the Mootuwallee as necessary to render the waqf or consecration legal. In this opinion Muhammad differs, but the practice is in accordance with the opinion of Abu Yusuf, as written in the *Mooneeah*, *Futhul Kuddeer*, *Seraj-ul-Wahaj*, *Hedayah*, and *Veekyat-ul-Rawahij*."

He did, however, note that the Chief Justice Ryan (C. J.) had referred to the conflicting opinions of Abu Yusuf and Muhammad and had held that, upon the authorities quoted by the Moulavees, the opinion of Abu Yusuf should be considered as the better law and sanctioned by the more recent authorities. So far as I have been able to ascertain Ghose J., nowhere expressed any disagreement with that opinion.

[9] The third judgment is that of Trayal J., one of the two Judges, who took the view that no question of law really arose in the appeal. Naturally, therefore, he expressed no opinion on the question as to the weight to be given respectively to the opinions of Abu Yusuf and Muhammad. The same view was taken by the fourth Judge, Prinsep J., who has stated in terms that he has thought it unnecessary to enter into any minute consideration of what might or might not be a valid waqf under the Muhammadan law. He mentioned 1838 Fulton 345<sup>5</sup> among a number of cases but did not discuss in any way the question of the weight to be given to the opinions of the two disciples when they differ.

[10] Lastly, the learned Chief Justice, Petheram C. J., gave his judgment, in which again that particular question was not discussed. A number of cases were mentioned but the conclusion was reached that the intention of the grantor was to create a great family estate and that such a purpose was not one for which a valid waqf could be created within the doctrine as laid down by the Judicial Committee of the Privy Council in 17 Cal. 498.<sup>6</sup>

[11] On a consideration of the judgments pronounced in 20 Cal. 116,<sup>2</sup> I cannot but agree with the remark of Sir Dinshah Mulla that when this Court in 15 ALL. 321<sup>1</sup> expressed the view that the opinion of Imam Muhammad should be preferred to that of Abu Yusuf, it did so on an erroneous interpretation of the decision of the Full Bench in 20 Cal. 116.<sup>2</sup>

[12] As appears from Ashworth J.'s judgment in 49 ALL. 391,<sup>3</sup> the view taken by the Bench in 15 ALL. 321<sup>1</sup> has never yet been re-considered. In effect it might be said that it has been followed without discussion no doubt for the reason that the dictum of the Judges that the authority of Imam Muhammad was to be preferred to that of Abu Yusuf was not ques-



tioned. Indeed, it seems to have been felt that that proposition was supported by the well-known judgment of Mahmud J. in 8 ALL. 149.<sup>7</sup> That appeal had been argued before the Full Bench while Mahmud J. was officiating as a member of the Bench. The appeal was not decided until after he had temporarily left the Court, but he gave a written opinion which was adopted by the members of the Full Bench and delivered as the judgment of the Court. In the course of his judgment which did not relate to the subject of waqf but to a question of marriage law, he remarked at page 166 :

"Imam Abu Hanifa and his two disciples are known in the Hanifa school of Muhammadan Law as 'the three Masters,' and I take it as a general rule of interpreting that law, that whenever there is a difference of opinion, the opinion of the two will prevail against the opinion of the third."

As a general statement that seems to have held good on most matters; but obviously it does not cover such a case as the present one in which the Imams held different views and it cannot be said that any two of them agree together, except in so far as it may be said that the two disciples agree in rejecting the opinion of Abu Hanifa that a decree of Court was necessary. Of course, it might equally be said that Abu Hanifa and Muhammad were in agreement that mere declaration was not sufficient. Elsewhere Mahmud J. remarked that :

"Both Imam Abu Hanifa and Imam Muhammad were purely speculative juris-consults, who spent their lives in extracting legal principles from the traditional sayings of the Prophet; but Qazi Abu Yusuf, while equally versed in traditional lore, had, in his position as Chief Justice of the Empire of the Khalifa Harun-ul-Rashid, the advantage of applying legal principles to the actual conditions of human life, and his dicta (especially in temporal matters) command such high respect in the interpretation of Muhammadan law, that whenever either Imam Abu Hanifa or Imam Muhammad agrees with him, his opinion is accepted by a well-understood rule of construction."

In my judgment there is really nothing in 8 ALL. 149<sup>7</sup> which helps us in the present case.

[12a] The rule enunciated in 15 ALL. 321<sup>1</sup> was followed without discussion in 1921 in 43 ALL. 487.<sup>8</sup> In that case it was sought to be argued that where under the Hanafi law the Imam (Abu Hanifa) and his two disciples differ, the opinion of Abu Yusuf will prevail. That contention was repelled on the strength of the decision in 15 ALL. 321.<sup>1</sup>

[13] The point was discussed in the same year in 19 A. L. J. 227.<sup>9</sup> That was a case in which the waqif appointed himself as the first mutwalli and the view was accepted that in such cases no actual transfer of possession is necessary since from the date of the declaration the possession of the waqif is in the capacity of a mutwalli. The learned Chief Justice (Mears C. J.)

quoted the views of Imam Hanifa and his two disciples and remarked that in the present case the Court must follow the opinion of Abu Yusuf and Muhammad, a proposition which although seemingly contradictory is not really so in a case of that particular kind where the waqif is himself the first mutwalli.

[14] Another case of the same kind in which the waqif appointed himself as the mutwalli is 1938 A. L. J. 727<sup>10</sup> in which reliance was placed on the earlier case in 19 A. L. J. 227.<sup>9</sup> Reference was also made to 1930 A. L. J. 109,<sup>11</sup> at p. 113 and to 49 Cal. 477.<sup>4</sup> The last reference is interesting because, as we have already pointed out, that case is an authority for the proposition that under the Hanafi law a valid waqf is created by declaration of an endowment by the owner and delivery of possession is not essential. The passage in the headnote on which reliance was presumably placed to support the decision in 1938 A. L. J. 727<sup>10</sup> was, however, another one in which it was stated that where the settlor appoints himself as the first mutwalli, no delivery of possession is necessary, a proposition which is obviously not one which it is at all necessary to lay down if the former proposition that mere declaration is sufficient be accepted. In the course of this decision Mookerjee J. referred to the view of the Calcutta Court stated in the judgment of Kemp J. in 12 W.R. 344,<sup>12</sup> and upheld in Letters Patent in the case reported in 12 W. R. 498,<sup>13</sup> that

"decisions are primarily given according to Abu Yusuf and next according to Imam Muhammad and that this preference to the opinion of Abu Yusuf is supported by the statement in the Fatawai Alamgiri."

The learned Judge went on to quote a long passage from Suzzat-ul-Fatawa dealing with this particular point and concluding with the words :

"But in the Mohit it is laid down that universality of our jurists (that is Indian jurists) have adopted the rule laid down by Abu Yusuf (that is, that under the Hanafi law a waqf is completed by the mere declaration) and this is correct."

He went on to point out that the rule had been laid down 80 years earlier in 1838 Fulton 345<sup>6</sup> and was not shown to have been ever successfully challenged. He only referred to the fact that in this particular case the settlor had appointed himself as the first mutwalli and that in such a contingency no formal delivery of possession from himself to himself would be necessary even according to Imam Muhammad, as a further difficulty in the path of the appellants.

[15] My learned brother Malik J. has referred in his referring order to the decisions of the Rangoon High Court in 2 Rang. 495,<sup>14</sup> of the Patna High Court in 8 Pat. 484,<sup>15</sup> of the Lahore High Court in 16 Lah. 432<sup>16</sup> and 18 Lah. 276,<sup>17</sup>



of the Madras High Court in I. L. R. (1938) Mad. 148.<sup>18</sup> of the Bombay High Court in 14 I. C. 988<sup>19</sup> and 57 I. C. 991,<sup>20</sup> and of the Lucknow Oudh Chief Court in 11 Luck. 735.<sup>21</sup> We have not thought it necessary to ask learned counsel for the appellant to take us through all these cases, it not being disputed by learned counsel for the respondent that this Court stands by itself in the view it has taken on this point. Reference to a number of these cases was, however, made by Ziaul Hasan J. who delivered the main judgment in the Full Bench case in 11 Luck. 735,<sup>21</sup> in the Chief Court of Oudh. I do not think it would serve any purpose to reiterate what has been said in that case. The learned Judge quoted from Mr. Ameer Ali's *Mohammadan Law*. Vol. I, Edn. 4, pp. 227 and 237, etc., and from the decision of the Calcutta High Court in 1838 Fulton 345<sup>5</sup> and from 20 Cal. 116<sup>2</sup> and he inferred from the latter case, as do I, that the only inference, if any, which can be drawn from it is that in India the opinion of Abu Yusuf prevails. He then went on to show that the High Court of Bombay had accepted the opinion of Abu Yusuf on this point as the correct opinion and that the Calcutta High Court had adopted the view expressed by the Moulavies and Rayan C. J. in 1838 Fulton 345<sup>5</sup> and the subsequent case in 49 Cal. 477.<sup>4</sup> He made some references to the original authorities quoted in this latter case and in 12 W. R. 344.<sup>12</sup> He further referred to the decisions of the Rangoon High Court and the Patna High Court.

[16] In the light of all these decisions and of the authorities on which they are based, I do not think there is any room for doubt that the view taken by this Court in 15 ALL. 321<sup>1</sup> is incorrect and that the correct view of the Hanafi School of law is laid down by Abu Yusuf, namely, that for the completion of a waqf a mere declaration by the waqif is sufficient. Learned counsel for the respondent has not seriously sought to persuade us that the view taken by this Court in the past was correct.

[17] The question which then arises is only whether, in view of the fact that the view taken in the past was incorrect and is at variance with the true view of the Hanafi law, this Court should now come into line with the true view as laid down by the other High Courts in India. The only argument which, as it appears to me, is urged against so doing is that it would open the way for a new set of contests in the Courts about the execution of waqfs. Instead of contests on the question whether possession has been delivered, we should in future have before the Courts contests in regard to the fact of the declaration — whether the declaration, if oral, was ever really made or not, whether if

it was documentary the waqif was *compos mentis* at the time of the execution of the document or was acting under the influence of fraud or undue influence. Perhaps we should have a series of contests on the allegation that the declarations were what is called fictitious, it being contended that the appropriator never intended to create a waqf but only intended to safeguard his property against seizure by creditors. It appears to me that the principle of *stare decisis* does not come into operation where the result of departing from an incorrect view of the law and following the correct view of the law is merely this, that in disputes on subjects to which that law applies a new set of defences will be put forward in the Courts. That principle is applicable only where the effect of departing from an established rule of decision will be to unsettle transactions which have been previously supposed to be finally settled. In my judgment, there is not anything in the present case which should deter us from holding that the view taken in 15 ALL. 321<sup>1</sup> and the cases which followed that case is incorrect and the correct view of the Hanafi law is that laid down by Imam Abu Yusuf, namely, that a mere declaration by the waqif is sufficient to complete a waqf and it is not necessary that possession be delivered to the mutwalli.

[18] Malik J.—I have read the judgment of my learned brother Yorke J. It is not necessary for me to deal with the points in detail, as I fully agree with the view expressed by him.

The question before us is whether under the Mohammadan law it is necessary for the completion of a waqf that the waqif should deliver possession to the mutwalli. The view of Abu Yusuf is that a mere declaration is enough. Imam Mohammad, on the other hand, is of the opinion that delivery of possession is required for the completion of a waqf. It is the view of Imam Mohammad that was followed in 15 ALL. 321.<sup>1</sup> In the other High Courts in India the view of Abu Yusuf has prevailed. It is urged on the strength of the case in 8 ALL. 149<sup>7</sup> that the view of Abu Yusuf is entitled to preference when all the three Imams have given different opinions on a particular point. I do not think that any such general rule of preference can be laid down. I am in complete agreement, if I may say so with respect, with the view expressed by the learned Chief Justice, Sir Shah Sulaiman, in 55 ALL. 743,<sup>22</sup> that the rules of preference were for the guidance of ancient jurists and they are of no help when there is a clear preponderance of authority in support of one view. There is no doubt that the theologians, jurists and other recognised interpreters of Mohammadan law have expressed their preference for the view



held by Abu Yusuf. Most of these authorities have been discussed at length by Ziaul Hasan J. in 11 Luck. 735.<sup>21</sup> It is not necessary for me to discuss those authorities again, specially as none of them were cited at the bar. The opinion of Abu Yusuf has been followed by all the other High Courts and by the text writers, as has been mentioned by me in my referring order. The consensus of opinion seems to be in favour of that view on the ground that a waqf under the Mohammadan law is not a gift to God but is renunciation of one's ownership, and it is, therefore, that no question of delivery of possession arises. I must, therefore, hold that the Mohammadan law, as interpreted by the Mohammadan jurists, is that a waqf by a Hanafi Musalman is completed by a mere declaration of intention and no delivery of possession is necessary.

[19] The view expressed in 15 ALL. 321<sup>1</sup> has, however, now been followed by this Court for over fifty years, and we have seriously to consider whether it is desirable that a view so well settled in this Court should be now disturbed or that we should abide by it and now adhere to that opinion. It is no doubt true that that decision is based, if I may say with great respect, on a misreading of the case in 20 Cal. 116.<sup>2</sup> Even then, I would have been reluctant to differ from that view if it were not that I feel that it is not likely that our decision would affect many transactions entered into or acted upon under the view as expressed in 15 ALL. 321.<sup>1</sup> Unless the question arises immediately after the waqf, in all cases of genuine declaration of waqf, the mutwalli must have started functioning and must have got possession of the property and the question of non-delivery of possession is generally relied on merely in disproof of the fact that there was a genuine intention to make a waqf. It may be urged that the decision in favour of the appellant may encourage a dishonest litigant to set up an oral waqf to defeat his creditors. I do not think any such result would follow as even under the present law no delivery of possession is necessary if a waqif constitutes himself the mutwalli. The question being of law applicable to the Hanafi Mohammadans in this country and it not being peculiar to this Province, any decision by their Lordships of the Judicial Committee in a case going from any Province would overrule the view in 15 ALL. 321.<sup>1</sup> I cannot, therefore, expect that on the principle of *stare decisis* the view in 15 ALL. 321<sup>1</sup> would always prevail in this Province even if that view is wrong. After carefully considering the question I think it is desirable that the law on the point should be uniform and it must be

brought into line with the view of the other High Courts in India.

[20] **Wali Ullah J.**—I have had the advantage of reading the judgments of my learned brothers and I agree that the correct view of the Hanafi law on the point involved in this case is that propounded by Imam Abu Yusuf, namely, that the waqf becomes complete and binding on the mere declaration by the waqif and it is not necessary that possession be delivered to the mutwalli. In view of the general importance of the question, however, I consider it desirable to deal with the matter at some length.

[21] The relevant facts of the case are quite simple and are set out in the judgment of my learned brother Yorke J. The main question which arises for consideration is whether under the Hanafi law a mere declaration by a waqif is sufficient to complete a waqf, or delivery of possession of the endowed property to a mutwalli is also necessary. It is well known that there is a great divergence of opinion among the three principal exponents—the three masters—of the Hanafi law. A waqf *inter vivos* is completed according to Imam Abu Yusuf by a mere declaration of endowment by the owner, according to Imam Muhammad, the waqf is complete only if after the declaration a mutwalli is appointed and possession of the endowed property is delivered to him. According to Imam Abu Hanifa, the founder of the school, however, the only way of making a waqf complete and irrevocable before the death of the endower is to obtain a decree to that effect in a fictitious suit; the decree is to be obtained by a procedure somewhat similar to that of an *injurecessio* of the Roman law and *finis and recoveries* of early English law (*Cf.* Hedaya 253, Baillie I 550). Both the disciples are at one in holding that the waqf is complete without the order of a Judge (*vide* Baillie's Digest p. 550), and *Tahtawi* says:

"No one has accepted the opinion of the Imam (Abu Hanifa), some few have followed Muhammad, but the universality of lawyers have adopted Abu Yusuf's rule."

The question, however, remains as to how the law is to be determined when there is a difference of opinion between Imam Abu Hanifa and his two disciples or when the two disciples differ from their master as well as from each other. Sir Dinshah Mulla in his *Principles of Mohammadan Law* (1944), Edn. 12, p. 25, has stated:

"It is a general rule of interpretation of the Hanafi law that where there is a difference of opinion between Abu Hanifa and his two disciples, Abu Yusuf and Imam Muhammad, the opinion of the disciples prevails. Where there is a difference of opinion between Abu Hanifa and Imam Muhammad, that opinion is to be accepted which coincides with the opinion of Abu Yusuf. When the two disciples differ from their master



and from each other, the authority of Abu Yusuf is generally preferred."

[22] This statement about the rules of interpretation of Hanafi law is based substantially upon the observations of Mahmud J., in the Full Bench case in 8 ALL. 149.<sup>7</sup> The judgment of Mahmud J., was adopted by the Full Bench after the learned Judge had temporarily left the Court. At p. 166 it was observed by Mahmud J.:

"I take it as a general rule of interpreting that law, that whenever there is a difference of opinion, the opinion of the two will prevail against the opinion of the third."

A similar observation was made by the same learned Judge in another Full Bench case of this Court in 14 ALL. 429<sup>23</sup> at page 448. Ameer Ali in his *Mohammadan Law*, Edn. 4, Vol. II, Chap. 12, S. 3, at pp. 516 and 517, has referred to the case in 8 ALL. 149<sup>7</sup> and has shown that there is no such fixed rule as was laid down in that case. He has further pointed out that over and over again Fatwas have been delivered in accordance with the opinion of only one of them. He has also referred to the well-known judgment of the late Maulvi Sami Ullah Khan, District Judge of Rai Bareilly in the case of *Mt. Rasulan and Zahuran v. Mirza Naimulla Beg (1891)*. The judgment was printed in the Indian Press Allahabad. In it the learned Maulvi has cited authorities in support of his proposition that the opinion of Imam Abu Hanifa has greater authority than that of his disciples singly or together. Again in his *Mohammadan Law*, Edn. 4, Vol. 1, p. 17, Ameer Ali has referred to certain authorities including Kazi Khan in support of the proposition that the joint opinion of the two disciples can be preferred to that of Imam Abu Hanifa if the difference is due to a change of circumstances and alterations in the conditions of mankind. In A. I. R. 1933 ALL. 634,<sup>22</sup> the late Sir Shah Sulaiman C. J., in a very learned judgment has fully discussed this question at pp. 636 and 637 and has come to this conclusion:

"There appears to be no such invariable rule which would make the decision depend on the majority of votes only."

At page 636 he observed:

"Different doctors have followed different rules of preference. Those who were more orthodox, and generally speaking, more ancient, in many cases preferred the solitary opinion of Abu Hanifa to even the joint opinion of his disciples. There are later text-book writers who have preferred the opinion of two as against that of one. But such rules are helpful only when there is no clear consensus."

In the early days when new points arose and the decision had to depend on an inference drawn from other fatwas or from analogy it was open to the learned doctors to prefer one opinion over the other which they considered more correct and consonant with the other principles, inasmuch as the three Imams were not law-givers but merely interpreters of the law."

Again at page 637 it is stated:

"Rules of preference were for the guidance of ancient jurists, and they are of no help when there is a clear preponderance of authority in support of one view. It would be too late now to resort to such rules in support of a new conception as to how a point ought to have been decided though contrary to accepted opinion."

The learned Judge has then referred to the opinion expressed by Maulvi Abdul Hai of Lucknow—the most renowned Hanafi jurist of his time—in his introduction of *Sarah Wiqayah*. In this connection reference might also be made to Sir Abdul Rahim's *Muhammadan Jurisprudence*, pp. 187 and 188, where "rules for guidance in cases of difference of opinion" have been indicated. At p. 187 the learned author quotes from *Durru'l Mukhtar*, Vol. 1, p. 52, to this effect:

"According to some fatwa . . . ought to be given absolutely according to the opinion of Abu Hanifa, even if all his disciples differ from him, and in absence of any dictum of his in accordance with the opinion of Abu Yusuf, then Muhammad, then Zafar, and then Hasan Ibn-Ziyad. This, however, cannot be said to be the accepted rule."

Then with reference to *Raddul's Mukhtar*, Vol. 1, p. 53, he says:

"It is also stated the learned have given fatwa according to the view of Abu Hanifa on all questions of Ibadat, or devotional matters and that, in all judicial matters . . . fatwa is based on the opinion of Abu Yusuf because of his experience as the chief Qadi of Baghdad and in questions relating to the succession of distant kindred on the opinion of Muhammad."

He then proceeds:

"But though this may be correct as a general statement, it would be misleading to regard it as a rule of invariable application. Al-Hawi lays down as the correct rule that in such cases of difference of opinion regard should be had to the authority and reasons in support of each view and the one which has the strongest support should be followed: and this is undoubtedly in strict accord with the principles of Muhammadan jurisprudence apart from the great weight which attaches to that eminent authority (Cf. *Durru'l Mukhtar*, Vol. 1 page 52)."

In the light of the authorities referred to above, it must be held that there are no fixed and inflexible rules of interpretation when there is a difference of opinion among the three masters. The subsequent history of the conflicting opinions expressed by the masters, and particularly the views held by later doctors regarding the correctness or otherwise of these opinions, will, generally speaking, be of much greater importance.

[23] According to the recognised doctrine of *Taqlid* of Mohammadan jurisprudence, jurists are classified as under: (1) Jurists who founded schools of law, such as Abu Hanifa, Malik, Shafi'l and Ibn Hanbal, the founders of the four Sunni Schools. To them is conceded an absolute and independent power of expounding the law. (2) Jurists who are conceded authority to expound the law according to a particular school. They were the disciples of jurisconsults of the



first rank. Abu Yusuf, Muhammad, Zafar and Hasan Ibn Ziyad are among the most prominent jurists of this class in the Hanafi School. (3) Jurists who were competent to expound the law on particular questions not settled by jurists of the first and the second ranks. Among the Hanafis *Tahawik*, *Sarakhsi*, *Bazdawi* and *Qazi Khan* attained this position. (4) Jurists who occupied themselves in drawing inferences and conclusions from the law laid down by jurists of higher ranks and expounding and illustrating what had been left doubtful. Abu Bakru'r Razi occupies a place in this rank. (5) Jurists who are generally held competent to discriminate between two conflicting opinions held by jurists of a higher rank. *Qaduri* and the author of *Hedaya* have been assigned a place in this rank. (6) Jurists who have authority to say whether a particular version of the law which has come down from eminent jurists of a particular school is strong or weak. The great jurist *Sadrush Shariyat* who has been called Abu Hanifa the second, has been given a place in this rank; and lastly (7) Lawyers who have to accept what the jurists of the above-mentioned classes have laid down. On any question not dealt with by jurists of the higher classes they have to proceed upon the analogy of what has been laid down in similar matters, taking into account the change in the customs and affairs of men. The author of *Durru'l Mukhtar* belongs to this class. "A lawyer of the present day should", according to Sir Abdur Rahim, Muhammadan Jurisprudence, p. 188,

"in such cases accept the view which according to the jurists of the fourth, fifth and sixth degrees is correct and has been acted upon. But if in any case the later doctors have not adopted in clear language any one of the conflicting opinions, the law is to be ascertained by proceeding on the view which is most in accord with the habits and affairs of men."

[24] To the same effect is the observation of Sir Shah Sulaiman C. J. in 55 ALL. 743.<sup>22</sup> At p. 637 the learned Judge after referring to *Raddu'l Mukhtar*, Vol. 1 p. 73, proceeds :

"It would follow that if jurists of the first rank have differed among themselves but the jurists of the second, third and fourth ranks have followed the opinion of one of them, it would not be proper in later times to go behind the opinion of these jurists and prefer the opinion of the majority of the jurists of the first rank which has been discarded by those of subsequent periods. The proper course undoubtedly is to abide by the opinions which have been adhered to in the commentaries which are of recognised authority in India and not to decide the point on any general rule of interpretation based on the majority of votes of the ancient jurists. Their Lordships of the Privy Council in 25 Cal. 92<sup>4</sup> at p. 18 remarked :

"It would be wrong for the courts on a point of this nature (the right of the widow to inherit) to attempt to put their own construction on the Quran in opposition to the express ruling of commentators of such great

antiquity and authority as the *Hedaya* and the *fatwai Alamgiri*."

[25] Bearing in mind the principles which flow from the authorities referred to above, we have to see whether on the questions before us there is any consensus or preponderance of authority of jurists of later times in favour of the view of Imam Abu Yusuf or that of Imam Muhammad. Before proceeding further, I might refer to *Surrat-ul-Fatawa*—a well recognised authority on Hanafi law—in which pointed reference has been made to the views held by a number of well-known authoritative books on the Hanafi law and the opinions held by a number of well-known doctors on the Hanafi law have been collated. *Surrat-ul-Fatawa* at page 430 states :

"Though, according to Mohammad, consignment of the dedicated property and separation of it (from the other properties of the waqf) are necessary to the completion of a waqf, according to Abu Yusuf, the waqf becomes absolute and binding, like emancipation, on the mere declaration of the waqf, and his right therein becomes extinguished at once. And in the *Khulasa* it is laid down that the jurists of Balkh decide according to the rule laid down by Abu Yusuf, and *Sadrush Shahid* has stated that the fatwa is according to him; and in the *Fath-ul-Kadir* it is mentioned that Abu Yusuf's opinion is the accepted doctrine : and in the *Munieh* it is stated that the fatwa is with Abu Yusuf; and this is the rule accepted by the jurists of Balkh. But the Bokhariots have adopted Mohammad's opinion. And in the *Sharh-i-Vikayah* and the commentary of Mulla Khusru (*the Durrar-ul-Akham*) it is laid down that the Fatwa is with Abu Yusuf. In some places, it is mentioned in the *Khanieh* (Fatawai Kazi Khan) that the fatwa is with Mohammad. . . . But in the *Muhit* it is laid down that the universality of our jurists have adopted the rule laid down by Abu Yusuf—and this is correct."

[26] It is clear from the quotation made above that such authorities as the *Khulasa*, *Sadrush Shalid*, *Fath-ul-Kadir*, *Sarah-i-Wiqayah*, Mulla Khusru's *Durrar-ul-Akham*, the *Muhit* as well as the *Surrat ul-Fatawa* itself have shown a clear preference for the opinion of Imam Abu Yusuf as opposed to the view of Imam Muhammad. The *Khanieh* (Fatawai Kazi Khan) no doubt states at some places that the fatwa is with Imam Muhammad, but it must be remembered that Kazi Khan was himself a prominent jurist of Bukhara and, as stated above, the Bukharites have adopted the opinion of Imam Muhammad as against the jurists of Balkh who upheld the rule laid down by Imam Abu Yusuf.

[27] Ameer Ali in his *Mohammadan Law*, Vol. 1, Edn. 4, at p. 227, says :

"As already stated, no formality is required to be gone through for the purpose of creating a valid waqf. It is enough if the donor declares that he constitutes a property waqf or has constituted it a waqf. That declaration fixes upon the property purported to be dedicated all the character of a legal and binding waqf, extinguishes the title of donor, vesting it in the



Almighty (whatever the object to which it is dedicated), and makes it irrevocably inalienable and non-heritable."

In support of this opinion, he has quoted *Siraj-ul-wahaj* and *Fath-ul-Kadir* (two very high authorities on the Hanafi Law: also quoted by the Law Officers in I. L. D. 848.<sup>5</sup>) Again, at p. 237 he observes:

"In order that a waqf should become operative or binding, it is not necessary under the Hanafi Law that the property should be actually delivered by the waqif to a trustee. Delivery of seisin is not necessary in waqf as it is in *hiba*. The mere declaration of the waqif is sufficient to constitute the property waqf, and the waqif from that time forth is a mere trustee."

[27a] It is clear from the above that *Sirajul-Wahaj* and *Fath ul-Kadir*, two very high authorities on the Hanafi law, also adopt the same opinion. As mentioned above, according to Tahtawi also—"The universality of lawyers have adopted Abu Yusuf's rule." On the contrary, there are no doubt some text books of Mohammadan law such as *Majmaul Anhar Sirajia* and *Bahrur Ra'iq* which are in favour of adopting Imam Mohammad's opinion, but it seems to me quite clear from all that has gone before that the great preponderance of authority, if not the consensus of authority, is on the other side. Coming to more recent times, Maulvi Abdul Hai of Lucknow, the most renowned and learned Hanafi jurist of his time, has expressed his clear preference for the opinion of Imam Abu Yusuf. In his marginal notes to *Hedaya*, Vol. 2, p. 484, the learned Maulvi has expressed himself thus:

"And this is also the dictum of most of the learned, i. e. waqf is constituted by the mere use of words such as 'I have made a waqf'. On this ground the dictum of Abu Yusuf is more reasonable according to the learned *Muhaggin* and Fatwa is given in accordance with this view, and it is stated on *Munia* and this is the opinion of the learned of Balkh, but the Bukharites have adopted the dictum of Imam Muhammad."

Again, Maulvi Abdul Hai, in his learned introduction to *Sharh-i-Wiqayah*, has dealt with this question at great length and has expressed a preference for the opinion of Imam Abu Yusuf. As mentioned above, Ameer Ali in his *Mohammadan Law*, Vol. 1, Edn. 4, at p. 237, is clearly of the same opinion and says that mere declaration of the waqf is sufficient to constitute the property waqf. Sir Abdul Rahim in his *Muhammadan Jurisprudence* at p. 308 has expressed the same opinion. He states:

"Opinion is considerably divided among the jurists on the question whether delivery of possession to a trustee at the time of making a waqf is necessary in law, but the weight of juristic opinion seems to lie in favour of Abu Yusuf's view according to which delivery of possession is not necessary. (*Fatwa-i-Alamgiri* Vol. 2, pp. 454 and 455)"

[28] Turning to the case law on the point, it is quite clear that the view of Imam Abu Yusuf has been adopted by the High Courts of Calcutta Madras, Bombay, Rangoon, Patna and Lahore

and by the Oudh Chief Court. It is not at all necessary to consider the decisions of other High Courts for it is common ground between the parties that the position is as has been stated above. Passing reference might, however, be made to the more important decisions of the Calcutta High Court in 1838 Fulton 345<sup>5</sup> and 49 Cal. 477;<sup>4</sup> to the decision of the Madras High Court in I. L. R. (1938) Mad. 148<sup>18</sup> and to the decision of the Full Bench of the Oudh Chief Court in 11 Luck. 735,<sup>21</sup> where this question has been discussed with reference to some of the original authorities and the case law on the point. The decisions of our own Court, however, can all be traced finally to the decision of two learned Judges of this Court, Tyrrell and Blair JJ. in 15 ALL. 321.<sup>1</sup> All subsequent decisions of this Court, viz., 43 ALL. 487,<sup>8</sup> 49 ALL. 391<sup>3</sup> and A. I. R. 1946 ALL. 468<sup>25</sup> are clearly based on that decision. In 15 ALL. 321<sup>1</sup> the learned Judges formulated the question which they had to consider thus:

"Is this deed, as amongst Sunnis, so valid by virtue of its execution only that this action to compel the execution of the trust would lie?"

The learned Judges before answering the question observe:

"We have been referred to authorities for the proposition that seisin, either formal or constructive, is essential to the validity of the *waqf*."

They then refer to the Tagore Lectures on Muhammadan Law, Part II (1874), at p. 115, where the views of the three masters, namely Abu Hanifa, Abu Yusuf and Muhammad, are summarised. Hamilton's *Hedaya*, 1870 Edn., p. 232 is next referred to and this again summarises the views of the three masters without expressing in clear language preference for any one of those views. Lastly, the learned Judges refer to the then recent Full Bench decision of the Calcutta High Court in 20 Cal. 116<sup>2</sup> and hold that in that case

"The comparative authority of Abu Yusuf on questions of Muhammadan Law amongst Sunnis is discussed, and the majority of the Full Bench decided that the authority of Abu Yusuf is to be postponed to that of Muhammad. This latter's exposition of the law which has just been cited supports the appellant's case."

In this view of the matter the appeal was allowed and the waqf was held to be invalid and inoperative. It is, therefore, obvious that the view of the law taken in the case of Muhammad Aziz Uddin Ahmad Khan was substantially based upon the decision of the Full Bench of the Calcutta High Court in 20 Cal. 116.<sup>2</sup> My learned brother, Yorke J., has closely examined the decision in 20 Cal. 116<sup>2</sup> and has shown that the decision in that case does not in reality support the view taken by the learned Judges of this Court in 15 ALL. 321.<sup>1</sup> If I may say so with all respect, I entirely agree with the reasons given by my learned brother. It is, therefore, wholly unneces-



sary for me to do more than to say that I concur in holding that the decision of this Court in 15 ALL. 321<sup>1</sup> was incorrect. It was based upon an erroneous interpretation of the decision of the Full Bench of the Calcutta High Court in 20 Cal. 116.<sup>2</sup> This point has been noticed by several of the well-known writers on Muhammadan law: *vide* Mulla's Muhammadan Law, 12th Edn. 1944, p. 25 (foot-note), Wilson's Anglo Muhammadan Law, 5th Edn. 1921, p. 92, and Tyabji's Muhammadan Law, 3rd Edn. 1940, p. 556 (foot-note). The correct view of the Hanafi law on the point is that which was propounded by Imam Abu Yusuf, i. e., a mere declaration of endowment by the waqif is sufficient for the completion of a waqf and it is not necessary that possession be delivered to the mutwalli.

[29] Lastly the learned counsel for the respondent has made an appeal to the well-known principle of *stare decisis*. It is no doubt true that the decision of this Court in 15 ALL. 321,<sup>1</sup> has stood for nearly half a century and has been followed by this Court in subsequent cases. It is also true that Courts always hesitate to overrule decisions which have stood for a long number of years unchallenged and are not at the same time manifestly erroneous and mischievous. The reason for this obviously is that security of title may not be endangered and transactions settled on the basis of the old decisions may not be unsettled by a reversal of the old view of the law. On the other hand, there is no room for the application of the principle of *stare decisis* when the reversal of the old view of the law does not really unsettle transactions entered into on the faith of the pre-existing law. In the present case, as shown above, the decision in 15 ALL. 321<sup>1</sup> clearly proceeded on an erroneous interpretation of the Hanafi law on the point and the effect of overruling that decision will not, in any case, be to unsettle transactions relating to rights of property to any appreciable extent. To adopt the language of Mukerji, Ag. C. J. in delivering the judgment of the Special Bench of seven Judges of the Calcutta High Court in 48 Cal. 184,<sup>26</sup> with which all the other learned Judges agreed, "our decision will not embarrass trade or commerce, nor will it affect transactions which may have been adjusted, rights which may have been determined, titles which may have been obtained or personal status which may have been acquired." In this connexion reference might also be made to the decision of their Lordships of the Privy Council in two cases, namely, 1915 A. C. 1100<sup>27</sup> at p. 1109 and 19 Bom L. R. 450,<sup>28</sup> where their Lordships in effect observed that a long series of decisions based upon a clearly erroneous construction of an act is not to be followed, while a long series of decisions based upon a construc-

tion not free from doubt should not be disregarded. So long as the decision in 15 ALL. 321<sup>1</sup> stands, the waqif has not only to make a clear declaration of endowment but also to do something more, namely, to deliver possession of the subject-matter of waqf to the mutwalli, but if that view be reversed and the principle enunciated by Imam Abu Yusuf be affirmed the result will be only this that the waqif need only make a declaration of the endowment and stop there. It seems to me, therefore, that any question of unsettling a settled transaction can hardly arise. I may add here that it is clearly desirable and in the interest of justice that, so far as possible, there should be unanimity between the several Courts in India on those matters where local conditions do not call for different results. As noted above, all the other Courts in India, including the Oudh Chief Court, have taken a view contrary to that held so far by this Court since the decision in 15 ALL. 321.<sup>1</sup> It seems to me, therefore that the principle of *stare decisis* does not really apply and should not weigh with us in the present case.

[30] **By the Court.**—Being unanimously of the opinion, for reasons given in our separate judgments, that the decision of the lower appellate Court based on the view expressed by this Court in 15 ALL. 321<sup>1</sup> is incorrect, we allow this appeal, set aside the judgment and decree of the lower appellate Court and restore the decree of the trial Court. Plaintiff-appellant will have his costs throughout.

N.S.D.

*Appeal allowed.*

**\* A. I. R. (34) 1947 Allahabad 211 [C. N. 96.]**  
FULL BENCH

BRAUND, MALIK AND PATHAK JJ.

*Allah Rabul Almin—Plaintiff—Applicant*  
*v. Ganga Sahai and others—Opposite Party.*

Civil Revn. No. 37 of 1945, Decided on 7th May 1946, against order of Small Cause Court Judge, Bulandshahr, D/- 25th August 1944.

\*(a) Civil P. C. (1908), O. 20, R. 3 — Rule applies to Chartered High Court in its appellate or revisional jurisdiction—Its applicability is not affected by O. 49, R. 2—Judgment once pronounced and signed cannot be recalled and altered except in cases where Court has inherent jurisdiction to rectify its mistakes — No practice in derogation of this law can be recognised — Civil P. C., O. 49, Rr. 2 and 3.

By virtue of O. 49, R. 3, the provisions of O. 20, R. 3, are inapplicable to judgments of Chartered High Courts delivered in cases coming under their ordinary or extraordinary original jurisdiction. By implication, therefore, O. 20, R. 3, would apply to judgments of Chartered High Courts delivered in the exercise of their appellate or revisional jurisdiction apart from S. 117 which makes the rules in Sch. 1 applicable to High Courts constituted by Letters Patent unless there is anything in the rules and Parts IX and X of the Code to the contrary.

[Para 8]



Order 49, Rule 2, Civil P. C., saves the rules which had already been in existence relating 'to recording of a judgment or order' of a Chartered High Court, i. e., the rules framed as to how its judgments should be given, whether orally or in writing or according to any mode which might appear to it best in the interests of justice and whether the judgment should be recorded in a particular book or with a particular seal : 9 All. 93 (F.B.), *Rel. on.*

Rule 2, C. P. C. or Chap. 7 of the High Court Rules has nothing to do with the question whether a Judge can or cannot alter his judgment after it has been pronounced and signed by him. The contention that by reason of O. 49, R. 2, O. 20, R. 3, is not applicable to judgments pronounced and signed by a Judge of the High Court cannot, therefore, be accepted. There is nothing in the Letters Patent or in any other provision of law which would justify the High Court in disregarding the provisions of O. 20, R. 3 which, by reason of S. 121, have the same force as if enacted in the body of the Code, though no doubt they are subject to any alteration or addition that the High Court may, from time to time, make by rules framed under S. 122 of the Code.

[Para 11]

Consequently, it is not competent to a Judge of the High Court who has once pronounced and signed a judgment on merits in a revision case *ex parte* before him to recall and alter that judgment at the request of either party. There is no law which would justify a Judge in recalling or altering a judgment except, may be, in those cases where the Court may have inherent jurisdiction to rectify its own mistake. In this respect no practice in derogation of law can grow up or can be recognised.

[Para 15]

C. P. C.—('44-Com.) O. 20, R. 3, N. 1, Pt. 1.

(b) Civil P. C. (1908), Sch. 1 — Rules in Schedule which are of general application apply to trial Courts as well as to appellate Courts in absence of specific provisions.

The rules contained in Sch. 1 cannot be divided into watertight compartments, namely, those contained in O. 1 to 40 as being applicable to original trials only and those contained in O. 41 to 44 as being applicable to appellate Courts only, and unless there are separate specific provisions for appellate Courts or there is anything in the rules to the contrary, such of the rules in Sch. 1 which are of general application are applicable to all Courts in accordance with the provisions of S. 117 and S. 107.

[Para 12]

Cases referred :—

1. ('87) 9 All. 93 (F.B.), *Sunder Bibi v. Bisheshar Nath.*
2. ('33) 20 A.I.R. 1933 All. 49 : 143 I.C. 324, *Jai Karan v. Panchaiti Akbara.*

K. C. Mital — for Applicant.

S. B. L. Gour and A. P. Gupta —

for Opposite Party.

**Malik J.**—This revision was filed under S. 115, Civil P. C. Mr. K. C. Mital was the counsel for the applicant. On 4th February 1946, the revision was put in the list of cases to be heard on that date before a learned Single Judge of this Court. At the time when the case was called, learned counsel for the applicant was not present in Court, nor had he sent an engagement slip, as provided for in the rules of this Court so that his case could be passed over on the ground that he was busy in another Court. The circumstances under which he was prevented from appearing were explained by him, but that is not

a matter which is relevant to the questions for decision at this stage.

[2] The learned Single Judge went through the judgment under revision and felt satisfied that it was not a fit case where he would like to interfere in the exercise of the revisional jurisdiction of this Court. He, therefore, delivered a judgment dismissing the revision on the merits and signed the judgment.

[3] After the judgment had been delivered and signed, but before it was sealed with the seal of this Court by the Bench clerk, Mr. Mital appeared and prayed for a rehearing.

[4] Mr. Mital relied upon a practice which, he said, prevailed in this Court of learned Judges permitting a rehearing of a case even after the judgment was delivered and signed but where it had not been sealed, in case learned counsel was able to satisfy the Judge that there was sufficient cause for his non-appearance at the earlier stage.

[5] As the matter related to a so-called practice of this Court, relied on by learned counsel for the applicant, the learned Single Judge considered that the point was of sufficient importance to be decided by a larger Bench.

[6] The questions for consideration by the Bench formulated by him were as follows :

"(a) When a Judge of the High Court has once delivered and signed a judgment on the merits in a revision case *ex parte* before him is it competent to such Judge to recall and alter that judgment at the request of either party ?

(b) If it is regulated by law, then what is the law in such a case ? and

(c) If it is regulated only by the practice of the Court, then, what is the practice of this Court ?"

This Bench was constituted for the consideration of these three questions.

[7] Learned counsel for the applicant has urged two points, firstly, that there is no legal bar to our rehearing a case if the ends of justice demand the same and O. 20, R. 3, Civil P. C., does not apply to such a case; and, secondly, that so long as the judgment has not been sealed there is no completed judgment and the case remains still undisposed of for the Court to rehear the case if it so desires.

[8] As regards the procedure to be followed in the disposal of case, S. 117, Civil P. C., (Act 5 [v] of 1908), provides that save as provided in Part 9 or in Part 10 or in the rules, the provisions of the Code shall apply to Courts constituted by His Majesty by Letters Patent. The relevant rules contained in Sch. 1 of the Code are : Order 20, rules 1 and 3 so far as they are relevant for our purpose are :

"1. The Court, after the cases has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.



3. The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by S. 152 or on review."

and O. 49, R. 2 :

"Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court."

and R. 3, so far as it is relevant for our purpose :

"The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely :

(5) Rules 1 to 8 of O. 20."

It would be noticed that O. 20, R. 3 of the Code is inapplicable to judgments of Chartered High Courts delivered in cases coming under their ordinary or extraordinary original jurisdiction. By implication, therefore, O. 20, R. 3, would apply to judgments of Chartered High Courts delivered in the exercise of their appellate or revisional jurisdiction apart from S. 117 which makes the rules in Sch. 1 applicable to High Courts constituted by Letters Patent unless there is anything in the rules and Parts 9 and 10 of the Code to the contrary. Section 107 (2) provides :

"Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction."

There appears to be no valid reason why the powers of this Court to rehear a case should be different from the powers conferred on the Courts of original jurisdiction.

[9] The provisions of O. 20, R. 3, Civil P. C., which are very clear, put an end to the contention of learned counsel for the applicant, as they clearly lay down that after the judgment has been pronounced and signed the said judgment shall not be altered or added to except for the purpose of correcting a clerical or arithmetical error under S. 152 or on review.

[10] Learned counsel has, however, urged that O. 20, R. 3 of the Code does not apply to this Court by reason of R. 2 of O. 49. Under R. 2 of O. 49 nothing in Sch. 1 shall limit or otherwise affect any rules in force at the commencement of the Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court. Learned counsel has relied on ch. 7 of the Rules of this Court which was in force at the commencement of this Code and has urged that those Rules make the provisions of O. 20, R. 3 inapplicable. These rules were framed under S. 633 of Act 14 [XIV] of 1882, which was as follows :

"The High Court shall take evidence and record

judgments and orders in such manner as it by rules from time to time directs,"

and provide that the Reader of the Court shall affix the seal of the Court to the judgment or order after it is delivered and signed by the Judge. This seal is to be affixed not by the Judge but by the Bench Reader. It would be really strange if it were held that the most important step, according to the submission of learned counsel, which gives finality to the judgment, is a step which is left to be taken by a subordinate officer of the status of a Bench Clerk.

[11] Order 49, R. 2, Civil P. C., saves the rules which had already been in existence relating 'to recording of a judgment or order' of a Chartered High Court, i. e., the rules framed as to how its judgment should be given, whether orally or in writing or according to any mode which might appear to it best in the interests of justice and whether the judgment should be recorded in a particular book or with a particular seal: see 9 ALL. 93.<sup>1</sup> Order 49, R. 2, Civil P. C., or ch. 7 of the High Court Rules has nothing to do with the question whether a Judge can or cannot alter his judgment after it has been pronounced and signed by him. I cannot, therefore, accept the contention of learned counsel that by reason of O. 49, R. 2, Civil P. C., O. 20, R. 3, was not applicable to judgments pronounced and signed by a Judge of this Court. There is nothing in the Letters Patent or in any other provision of law which would justify this Court in disregarding the provisions of O. 20, R. 3 which, by reason of S. 121, have the same force as if enacted in the body of the Code, though no doubt they are subject to any alteration or addition that this Court may, from time to time, make by rules framed under S. 122 of the Code.

[12] Learned counsel in a written argument, supplied after we had reserved judgment, has suggested that rules (*sic.* Orders) 1 to 40 of Sch. 1, Civil P. C., must be confined to original trials and rules (*sic.* Orders) 41 to 44 alone apply to appellate Courts. We cannot accept this contention. The rules contained in Sch. 1 cannot be divided into such water-tight compartments and unless there are separate specific provisions for appellate Courts or there is anything in the rules to the contrary, such of the rules in Sch. 1 which are of general application are applicable to all Courts in accordance with the provisions of Ss. 117 and 107, Civil P. C.

[13] Learned counsel has drawn our attention to a decision in A. I. R. 1933 ALL. 49.<sup>2</sup> In that case the judgment had been signed by inadvertence by Sulaiman C. J., and it was on that account that it was held that O. 20, R. 3 was no bar and the case could be reheard and the judg-



ment altered under the inherent jurisdiction of this Court. Learned counsel for the applicant cited several other cases, but they do not relate to the question whether the Judge is entitled to alter or add to a judgment after he has pronounced and signed the same. To my mind, we are bound by the provisions of O. 20, R. 3 of the Code and hold that except within those well-known limits where a Court can exercise its inherent jurisdiction, one of such cases being the case before Sulaiman C. J., in A. I. R. 1933 ALL. 49,<sup>2</sup> there is no inherent jurisdiction in the Court to rehear a case and alter or add to a judgment which has been duly pronounced and deliberately signed in accordance with law.

[14] Learned counsel for the applicant drew our attention to certain provisions of the Criminal Procedure Code and certain decisions of this Court under those provisions, but, to my mind, we would not be justified to go beyond the provisions of the Civil Procedure Code even though the language of the two Acts may, in certain respects, be similar.

[15] For the reasons given above, I would answer the question referred to us in this way that to the first question my answer is that it is not competent to a Judge who has once pronounced and signed a judgment to recall and alter that judgment at the request of either party. On the second question my answer is that there is no law which would justify a Judge in recalling or altering a judgment except, may be, in those cases where the Court may have inherent jurisdiction to rectify its own mistake. And to the last question, my opinion is that no practice in derogation of law can grow up or can be recognised.

**Braund J.** — I agree and have nothing to add.

**Pathak J.** — I agree and have nothing to add.

K.S. *Answer accordingly.*

**\*A. I. R. (34) 1947 Allahabad 214 [C. N. 97.]**

**BRAUND AND WALI ULLAH JJ.**

*Ram Narain Singh and others — Defendants — Appellants v. Nawab Singh and others, Plaintiffs and others, Defendants — Respondents.*

First Appeal No. 468 of 1937 connected with F. A. No. 197 of 1938, Decided on 26-10-1945, from decision of Second Civil Judge, Meerut, D/- 16-8-1937.

(a) Registration Act (1908), S. 28 — While attesting and executing mortgage, only properties at G included—Subsequently property at M marginally added—Mortgage registered at M — Held registration at M was invalid — Question of intention held did not arise.

At the time of attestation and execution of a mortgage, the deed contained only properties at G. Sub-

sequently property at M was marginally added to it and it was presented for registration in the office of the Registrar at M, and registered there :

*Held* that the mortgage deed was an instrument which, according to the requirements of S. 59, T. P. Act, mortgaged only the properties at G and was not, therefore, under S. 28, Registration Act, a document capable of being registered at M and could not be legally registered there. Hence, it was an unregistered mortgage and as a mortgage it failed : [Para 17]

*Held also* that no question of intention in including the properties at M arose in such a case. Even if there had been an intention that the property at M should actually be mortgaged it would have been quite immaterial, since what was required by S. 59, T. P. Act, was not an intention to mortgage but a formal compliance with the section in respect, among other things, of registration. In that respect the mortgage having failed the question of intention did not arise. [Para 17]

Registration Act —

(45) Chitale, S. 28 N. 8.

(36) Mulla, Page 137.

\* (b) T. P. Act (1882), S. 101 — Subsequent mortgage — Keeping alive of earlier mortgage — Scope and applicability of doctrine of — First mortgage in 1916 — Second mortgage in 1921 of same properties in favour of another person — Third mortgage in 1922 of same properties in favour of 1916 mortgagees, in renewal of 1916 mortgage — 1922 mortgage found to be invalid owing to defect of registration — On consideration of recitals in 1922 mortgage held there was express contract to keep 1916 mortgage alive—Assuming that 1916 mortgage was absorbed in 1922 mortgage held it was case of revival of earlier mortgage—Held on failure of 1922 mortgage, 1922 mortgagees were entitled to fall back upon 1916 mortgage.

So far as the relations of mortgagor and successive mortgagees are concerned, the question that invariably arises is in respect of keeping alive of an original mortgage as a protection or shield against an intervening encumbrancer whether the case arises out of a subsequent mortgage in renewal of an earlier one or of a purchase of an equity of redemption. The only case in which it is to the benefit of a mortgagee or chargeholder to keep an encumbrance alive is when it is necessary as a defence against a subsequent encumbrance. Even in cases where the presence of an intention to keep alive an earlier mortgage has to be proved or disproved, it is only the intention to effect some purpose or to guard against some contingency which can be foreseen at the date of the subsequent mortgage that is material and not any threat to the mortgage which may perhaps arise later against which it may suit his purpose to be protected. *A fortiori* the doctrine of "keeping alive" would not, therefore, apply in a case of a failure of the subsequent mortgage through lack of registration. [Paras 18 & 19]

In 1916 mortgagors executed a mortgage of certain properties in favour of the first mortgagees. In 1921 they executed a second mortgage of the same properties in favour of the second mortgagees. In 1922 they again mortgaged the same properties in favour of the first mortgagees. The consideration for the 1922 mortgage was the sum due on the 1916 mortgage and a further advance of a certain sum and was in form actually a renewal of the 1916 mortgage. The material clauses of this 1922 mortgage in this respect were in these terms : "(11) This document has been executed in place of the previous document, therefore, the creditors shall have all the usual rights to the property hypothecated which they had under the document of 1916"; "(13) The creditors shall always have the power to realise their



money jointly or severally whenever and in whatever way they like by enforcement of the prior hypothecation lien and by the sale of the hypothecated property....". This 1922 mortgage was proved to be ineffective as a mortgage owing to defect of registration. The question was whether on the failure of the 1922 mortgage the mortgagees could fall back upon the first 1916 mortgage:

*Held* that cl. (13) of the 1922 mortgage was an express clause keeping alive the 1916 mortgage. The words "by enforcement of the prior hypothecation lien" referred only to the 1916 mortgage. The clause in effect provided that notwithstanding the 1922 mortgage the mortgagees would always have the right to enforce the 1916 mortgage. There was thus an express contract between the parties for keeping alive the 1916 mortgage for the purpose of being enforced directly against the mortgagors. There was, therefore, no necessity of having resort to the principle of keeping a mortgage alive as a shield against an intervening mortgage:

[Para 24]

*Held further* that where persons enter into a transaction which, if followed, would have the effect, by implication or expressly, of rescinding a former contract and thereby inducing them to alter their relative position and it turns out that the transaction cannot operate as the parties intended, then their rights under the former transaction remain unaffected: (1866) 1 Ex. 117; (1867) 2 Ex. 135; 3 A. I. R. 1916 Cal. 136 and 2 Bom. H. C. R. 198, *Rel. on.*

[Para 26]

A person cannot claim from a Court of equity a benefit without accepting the just consequences of the relief he asked for. Where, therefore, a transaction is, at the instance and for the benefit of a party, declared for some reason to have failed equity will not give him the benefit of that failure unless he also assumes the logical burden of its consequences. In the present case, the mortgagors had themselves set up the failure of the 1922 mortgage on the ground of want of registration. The purpose of the 1922 mortgage was admittedly to give to the 1922 mortgagees a fresh security in place of, and over the same property as was comprised in the 1916 mortgage. Hence, on failure of the 1922 mortgage the whole purpose of the transaction having been defeated it would be contrary to equity and good conscience to allow the mortgagors to say that they were entitled to take the benefit of the failure of the 1922 mortgage without recognising the revived existence of the 1916 mortgage which it had throughout been the intention of the parties that it should replace. Even assuming, therefore, that the 1916 mortgage were absorbed in the 1922 mortgage as between the mortgagors and the mortgagees it was a case of 1916 mortgage being revived for the benefit of the 1922 mortgagees on the failure of the 1922 mortgage: 3 A. I. R. 1916 P. C. 68, *Rel. on.*

[Paras 25 & 26]

*Held*, therefore, that on failure of the 1922 mortgage, the 1922 mortgagees were entitled to fall back upon the 1916 mortgage and claim enforcement of their rights under that mortgage as against the mortgagors.

[Para 20]

#### T. P. Act —

(45) Chitaley, S. 101, N. 4.

(36) Mulla, Pages 556 and 559.

(c) Limitation Act (1908), S. 19—Recitals in subsequent mortgage with reference to earlier mortgage held amounted to admission of liability under earlier mortgage.

A mortgage of certain properties which was executed in revival of an earlier mortgage over the same properties provided with reference to the earlier mortgage that the properties were already hypothecated to the mortgagee under the earlier mortgage in respect of an amount whereof the later mortgage was executed, that the later mortgage having been executed in place of the

earlier mortgage the mortgagees would have all the usual rights to the property hypothecated under the later mortgage which they had under the earlier one and that the mortgagees would always have the power to realise their money in whatever manner they liked by enforcement of the prior hypothecation lien:

*Held* that the above recitals in the later mortgage were sufficient to constitute an admission of liability under the earlier mortgage.

[Para 31]

#### Limitation Act —

(42) Chitaley, S. 19 N. 36.

(38) Rustomji, Page 300, Note "Admission of debt or liability."

(d) Limitation Act (1908), S. 19—Mortgagor cannot give acknowledgment of prior mortgage so as to affect rights of subsequent mortgagee acquired before acknowledgment.

A mortgagor cannot under S. 19 give an acknowledgment so as to affect behind his back the rights of a subsequent mortgagee acquired before that acknowledgment is given. Hence, an acknowledgment of liability by the mortgagor in respect of the first mortgage contained in the third mortgage by the same mortgagor is not effective as an acknowledgment to start a fresh period of limitation in favour of the third mortgagee as against a second mortgagee who derived his title from the mortgagor prior to the acknowledgment given in the third mortgage: 1 C. L. J. 337 and 29 A. I. R. 1942 P. C. 67, *Rel. on.*; 32 A. I. R. 1945 All. 239 (F. B.), *Disting.*

[Para 36]

#### Limitation Act —

(42) Chitaley, S. 19 N. 35.

(38) Rustomji, Page 352, Pt. 7.

(e) Civil P. C. (1908), Ss. 96, 107 — Reasons for finding of fact of trial Court meriting considerations—First appellate Court will not lightly interfere with finding.

Where the reasons given by the trial Court for the finding of fact arrived at are reasons which merit consideration, the appellate Court, even in first appeal where admittedly the facts are open, will not lightly substitute a different judgment of its own for that of the trial Court who has seen and heard the witnesses.

[Para 16]

#### C. P. C. —

(44) Chitaley, S. 107, N. 14, Pt. 2.

G. S. Pathak — for Appellants.

P. L. Banerji, C. B. Agarwala, S. M. Hussain and M. A. Rauf — for Respondents.

**Braund J.** — Two appeals are before us, the first arising out of a suit No. 12 of 1933 tried by the Second Civil Judge of Meerut, and the other arising out of a suit No. 44 of 1934 tried by the same Judge. The two suits were in the nature of cross-suits and can conveniently be dealt with in one judgment.

[2] The first of these two suits, No. 12 of 1933, was a suit by five plaintiff mortgagees for the sale of certain property of which they claimed to be first mortgagees under a mortgage of 9-2-1921. Since the priority of this mortgage of 1921 relative to another mortgage of 1922 is one of the matters in issue in these appeals, I shall refer to it, not as the first mortgage, but as the "1921 mortgage". The plaintiffs in the first suit claimed as first mortgagees under the 1921 mort-



gage. The first two defendants to the suit were the mortgagors, Sheikh Nazim Uddin and Sheikh Ala Uddin. It appears that throughout the transactions relative to the several mortgages which are in question in these proceedings, Ala Uddin executed the various mortgage instruments merely for what is technically known as "further assurance". He himself claims no actual beneficial interest in the property mortgaged; but was made a party to the various mortgage instruments for the satisfaction of the mortgagees so as to release any scintilla of beneficial interest he might have had; but it is nowhere shown that in fact he had any such interest. The second set of defendants to the suit (apart from the Official Receiver, who does not appear at any stage to have been a proper party) were the mortgagees under a mortgage instrument executed by the same mortgagors of (inter alia) the same property as was comprised in the 1921 mortgage. This mortgage was a mortgage of 26-8-1922, and is hereinafter referred to as the "1922 mortgage". The mortgagees under the 1922 mortgage were, therefore, made defendants to the first suit in the capacity of subsequent mortgagees.

[3] The 1921 mortgage on which the plaintiffs sued was a mortgage of certain property in the village of Sikri near Ghaziabad, which is hereinafter called "the Ghaziabad property" to distinguish it from the "Meerut property" which will be mentioned presently. The 1921 mortgage comprised the Ghaziabad property and nothing else, and was to secure a principal sum of Rs. 30,000 with interest at 8 per cent. per annum. Under the 1921 mortgage the plaintiffs claimed a gross sum for principal and interest which, at the date of the suit, amounted to Rs. 76,986. By their plaint of 9-2-1933—a very long time ago—they claimed the usual relief by way of sale under a simple mortgage. And it has to be noticed that they went out of their way to plead, first that the 1922 mortgage was altogether inoperative because it was improperly executed and, secondly that, even if it was properly executed, it was only a second mortgage. This was a case of anticipating the defence.

[4] The defence of the mortgagors was to admit the 1921 mortgage and to deny the 1922 mortgage in toto on the ground of defective execution. To this extent the mortgagors marched with the 1921 mortgagees, who were the plaintiffs. But neither the plaintiffs nor the mortgagors at that stage gave any particulars of the defective execution, nor specifically pleaded anything about defective registration. In view, however, of the subsequent suit which brought the issues out more clearly, that is not perhaps now a serious matter. The mortgagors then went on to say that the interest was excessive. That is not in

issue in this appeal. And finally they said that the mortgagor, Ala Uddin, had no interest in the Ghaziabad property and was not actually a mortgagor at all. That seems to have been true, except for the further assurance given by him.

[5] The defence of the 1922 mortgagees was that, after a formal denial of the 1921 mortgage altogether, they said that they were in any case prior mortgagees by virtue of the 1922 mortgage itself, which they asserted to have been properly executed and registered in all respects. They based this on an allegation that the 1922 mortgage was only a renewal of an earlier mortgage of 12th February 1916 (hereinafter called "the 1916 mortgage") and that, by virtue of the well-known principle of keeping an earlier mortgage alive as a shield against an intermediate encumbrancer, they were entitled to priority in respect of the 1922 mortgage over the 1921 mortgage. If that failed, then the 1922 mortgagees claimed that they were still entitled to fall back on the 1916 mortgage itself and to claim priority over the 1921 mortgage to the extent of all principal and interest still outstanding under that mortgage. This involved certain questions of limitation, which are more clearly brought out in the second of the two suits.

[6] That was the substance of Suit No. 12 of 1933. The other suit—Suit No. 44 of 1934—was in the nature of a cross-suit that the real issues are more clearly exemplified. The 1922 mortgagees are the plaintiffs in the second suit, and (apart from the Official Receiver who was again made a party) they made the mortgagors defendants, together with the 1921 mortgagees, claiming as against the latter that they were only puisne encumbrancers. The plaintiffs in this suit specifically pleaded the 1916 mortgage. It was a mortgage by which the mortgagors had charged the Ghaziabad property to the 1922 mortgagees with the repayment of a sum by way of principal and interest which at the date of the 1922 mortgage amounted to Rs. 1,11,553. The 1922 mortgage included the Ghaziabad property, together with one bigha of land at Meerut, which I shall call the "Meerut property". A good deal of the controversy of fact in these appeals revolves about this one bigha of Meerut property and I shall explain in a moment the rival stories of how it came to be included. Meanwhile, there is no doubt that the 1922 mortgage was in form actually a renewal of the 1916 mortgage, a further advance of Rs. 14,647 being taken making up the total principal sum of Rs. 1,26,200 secured by the 1922 mortgage. This, at the date of the second suit in 1934, amounted to a sum for principal and interest of Rs. 2,40,354, which was accordingly the sum in respect of which the 1922 mortgagees sued in the second suit. They pleaded



that, by virtue of the renewal of the 1916 mortgage, the 1921 mortgagees were puisne mortgagees in respect of the whole of this sum, but that, if for any reason the 1922 mortgage *as such* failed, they were still entitled to fall back and to sue exclusively on the 1916 mortgage which they had specifically pleaded for the purpose. And, for that purpose, they said that the 1916 mortgage was saved from limitation, both as against the mortgagors and as against the 1921 mortgagees, by the acknowledgment of it given by the mortgagors to the plaintiffs in the 1922 mortgage instrument. The 1922 mortgagees accordingly asked for a decree, first, on the 1922 mortgage itself, and, in the alternative, on the 1916 mortgage.

[7] The defences to this second suit bring out more clearly the actual issues with which we have been called upon to deal in these appeals. The mortgagor, Nazim Uddin, for whom Sir Tej Bahadur appears, in para. 16 of his written statement first comprehensively challenges "the execution and completion" of the 1922 mortgage, saying that it was altogether defective as regards both execution and attestation. He then goes on in paras. 17 and 18 to say that the registration of the 1922 mortgage was bad, in order to destroy it as a mortgage on that ground altogether. It is in this connexion that the Meerut property, which, it will be remembered, was added to the 1922 mortgage for the first time, becomes material. What is actually alleged by Nizam Uddin is that, *as originally drawn and executed*, the 1922 mortgage instrument never comprised the Meerut property at all. It was, he says, confined solely to the Ghaziabad property. The parties first made an attempt on 26th August 1922 to get the mortgage registered at Ghaziabad. The story, as expanded in detail in evidence, is that the officials, or some of them, of the Ghaziabad Registry, seeing that the matter was an important one, demanded five hundred rupees for the privilege of registration. Not being willing to pay this, the mortgagees then suggested that they should return to Meerut, where they lived, and try to get it registered at the Registry at Meerut. For this purpose, it was necessary to add some property within the jurisdiction of the Meerut Registry to the mortgage in order to found a right to registration there. It was, therefore, proposed (at the suggestion. I think, of the mortgagees) that Nazim Uddin should add one bigha of his property at Meerut to the 1922 mortgage, not with any intention actually of mortgaging it, but merely so as to "dress it up" as a document capable of being registered at Meerut. This, of course, if this story is the right one, was long after execution on 26th August. The whole scheme, on this version, was devised

for the purpose of deceiving the Meerut Registrar into accepting the registration at his Registry. If that were so, then the contention would be first that there was in reality no mortgage of any Meerut property; and, secondly, that the marginal addition of the Meerut property to the already executed document of 1922 (without any fresh attestation) was ineffective to mortgage the Meerut property at all having regard to S. 59, T. P. Act, 1882, and therefore, that there was, at the moment of presentation of the document to the Meerut Registrar on 12th September, no mortgage of the Meerut property within the meaning of the Transfer of Property Act, 1882. It would follow from this, if it is true, that the document which the Meerut Registrar was tricked into registering in his Registry was actually a document which mortgaged no property within his jurisdiction. Hence under S. 28, Registration Act, he had no jurisdiction to register it and consequently there has been no lawful registration of the 1922 mortgage. That, as we understand it, is the mortgagors' version of the facts and it is a contention in which, of course, the 1921 mortgagees support him. For that reason the mortgagors say that the 1922 mortgage, *as a mortgage* must go; and they go further and assert that, in that event, nothing is left in favour of the 1922 mortgagees, since they cannot rely on the 1916 mortgage, both because according to them it was wiped out of existence by the 1922 transaction altogether, and secondly because it is in any case time barred. They deny the acknowledgment because they say that, once the 1922 mortgage has been disposed of on the ground of defective registration, it can be relied on for no purpose. And, in any case, they alleged that the 1922 transaction completely absorbed the 1916 mortgage which no longer existed as between mortgagor and mortgagee and cannot now be revived as a second string to the bow of the 1922 mortgage. I have put that in my own language, but I think it substantially represents the ground on which the mortgagors rest their defence. They say, of course, that Ala Uddin was never a mortgagor at all.

[8] As to the first mortgagees, they support the mortgagors on the facts and on their contention that the 1922 mortgage was never validly registered and also that it completely ousted the 1916 mortgage so that the 1922 mortgagees cannot fall back on it. But the 1921 mortgagees go further, as they are bound to do, and say in addition that, even if the 1916 mortgage did survive for the benefit of the 1922 mortgagees by virtue of an acknowledgment given in the 1922 document or otherwise, then no such acknowledgment could prejudice the right of the 1921 mortgagees, who took their title before it



was given, in any defence against the 1916 mortgage that they would otherwise be able to raise under the Indian Limitation Act. They were no parties to the acknowledgment of 1922, assuming it was given by the mortgagors, and, therefore, they say that, having derived their title before it was given, it was not open to the 1916 mortgagors by any acknowledgment of theirs to prejudice their rights in respect of limitation.

[9] Those are, generally speaking, the issues raised on the pleadings. Having given the mortgagors' version of the facts relating to registration, it is right at this point, for the purpose of making the issues clear, to give the opposite version of the facts in connection with registration which has been advanced by the 1922 mortgagees. They say that it is quite untrue that the Meerut property was added to the 1922 mortgage after execution and that the whole story of the demand by the office of the Registrar at Ghaziabad for a sum of money before registration is entirely untrue. What they allege to have happened is that it was all along agreed in the negotiations for the 1922 mortgage that a piece of Meerut property should be added to the security. Then, on the day of execution by Nazim Uddin on the 26th August at Meerut, when the engrossment of the 1922 mortgage was made, it was found that by mistake the piece of Meerut property had been omitted by the draftsman. It was then—in the presence of the parties and of the witnesses and *before* execution—added in the margin and signed marginally by the mortgagor Nazim Uddin. It was, therefore, they say, actually in the document at the moment of execution and attestation. I should add that the document was executed by Nazim Uddin at Meerut on 26th August and by Ala Uddin two days later at Mussoorie; but we are primarily concerned with what happened at Meerut. I shall discuss these facts more fully later when I come to deal with them and I have merely set out the version of the 1922 mortgagees at this stage in order to make the issues clearer.

[10] Disentangling this somewhat complicated story it appears to have raised the following questions.

[11] The learned Civil Judge first considered the question of fact with reference to what happened in respect to the insertion of the Meerut property in the 1922 mortgage. He came to the conclusion that the mortgagors' story was the more probable one, and he accepted it. He held as a fact that when the instrument was executed by Nazim Uddin and attested at Meerut on 26th August it did *not* include the Meerut property. This was added later — on the 12th September—after execution and attestation and the addition, though signed by Nazim Uddin,

was never attested. It follows that, when the 1922 mortgage was executed by Ala Uddin and attested at Mussoorie on the 28th August, it equally did not contain the Meerut property. That issue of fact is, therefore, the first matter we have to deal with in these appeals.

[12] If we come to the conclusion that the learned Civil Judge's view of the facts was the right one, then it remains for us to consider what the result was. The learned Judge held that in consequence of what had happened there was no lawful registration and that, therefore, the 1922 mortgage failed *as a mortgage*. He, therefore, disposed of the 1922 mortgagees' claim *on the 1922 mortgage* on that ground, both as against the mortgagors and *of course* as against the 1921 mortgagees. He then went on to consider whether, having failed on the 1922 mortgage, the 1922 mortgagees were entitled to fall back on to the 1916 mortgage. He thought that they were entitled to fall back on it; but he held that they were entitled to fall back on to it only as against the mortgagors, since the acknowledgment given by the mortgagors in the 1922 mortgage could not avail as against the 1921 mortgagees who acquired their title prior to the giving of it.

[13] The issues, therefore, with which we are concerned in this appeal are as to which, if either version of the facts as to the execution, attestation and registration of the 1922 mortgage, is the right one? If the mortgagors' version is the true one, then what is the effect on the mortgage of 1922? If the mortgage of 1922 should fail as a mortgage for want of registration, can the 1922 mortgagees, as between themselves and the mortgagees (apart altogether from any question of protecting themselves from the 1921 mortgage) fall back on to the 1916 mortgage? In other words, can the 'doctrine against the merger' (for want of a better term) serve to keep alive an earlier incumbrance where (a) a later incumbrance has replaced it and (b) the later incumbrance itself fails because of some inherent defect? In short, is the doctrine available *only* as a shield against an intermediate claim, or is it available directly for the benefit of the mortgagee against his mortgagor? It is on this question that Sir Tej Bahadur Sapru on behalf of the mortgagors principally relies to rid the mortgagors of the 1922 mortgage. There remains the question of limitation. Assuming that the 1922 mortgagees have a right to fall back on the 1916 mortgage, then a question of priority remains as between the 1922 mortgagees and the 1921 mortgagees and also as between the 1922 mortgagees and the mortgagors. This depends partly on the construction of the 1922 mortgage instrument, and, so far as it is a question of priority as between the 1922 mortgagees and the



1921 mortgagees, it also depends on the law applicable to a case in which a mortgagor gives to a subsequent mortgagee an acknowledgment after he has created an intermediate mortgage.

[14] I shall deal first with the question of fact. The issue to which the question of fact relates is really the issue whether the 1922 mortgage instrument was ever effectively registered so as to become "a registered instrument" within the meaning of S. 59, Transfer of Property Act, 1882. I have already set out above the version of the mortgagors and the 1921 mortgagees, who are the respondents in both appeals. It is to the effect that, when the 1922 mortgage was executed and attested at Meerut on the 26th August by Nazim Uddin and at Mussoorie on 28th August by Ala Uddin, the one bigha of Meerut property was not included in it. That, they say, was not added until the 12th September, and then only by way of a marginal addition signed by Nazim Uddin and unattested. They say, moreover, that it was so added without any intention of ever forming part of the mortgage security, but merely for the purpose of pretending before the Registrar that the deed was a deed mortgaging some Meerut property, so as to bring it for registration purposes within his jurisdiction. The appellants' version is quite a different one. They have said that it was throughout the intention to add one bigha of land at Meerut to the security and that the circumstance that it was added as a marginal addition was due solely to a clerical mistake in the engrossment and that it was added by the engrossing "scribe" prior to execution and attestation. It should perhaps have been said earlier that there appear at the foot of the instrument two notes . . . "Note 1" and "Note 2". Each of these notes is signed by Nazim Uddin. "Note 1" is immaterial for our present purpose. But "Note 2" refers to the addition of the Meerut property in the margin on p. 2 of the deed. It is said by the appellants that both these notes were on the document before its execution by Nazim Uddin on 26th August. They are each signed by Nazim Uddin. Then follows a third signature of Nazim Uddin, being his general execution of the whole instrument and finally there appear the various signatures of the attesting witnesses. This document will have to be examined more closely. Somewhat surprisingly the learned Civil Judge did not send for the original of the 1922 mortgage instrument. Since the issue of fact relates to a matter of how a particular document was executed and what was the condition of the document itself at the time of execution, we have ourselves thought it necessary to have the actual instrument before us and we have accordingly by consent of the parties

had it produced. It has afforded us some assistance.

[15] The appellants have produced three witnesses in evidence of the condition of the 1922 mortgage instrument at the moment of its execution by Nazim Uddin at Meerut on 26.8.1922. The first is Joti Swarup who was himself one of the second mortgagees. He gives evidence to the effect that, during the negotiations for the 1922 mortgage, it had been deliberately agreed between him and Nazim Uddin that the one bigha of the Meerut property should be included in the new security. And the reason he assigns for this is that he wanted one bigha of land at Meerut in order to build a house on it for himself. It strikes me as a somewhat curious way of carrying out the transaction. If he had wanted to buy a piece of land from Nazim Uddin at Meerut, the simplest course would have been for him to have bought it outright and taken a transfer of it. Moreover, one might have expected in that case to have found some specified bigha of land chosen by Joti Swarup. Nazim Uddin owned, I believe, some forty bighas of land at Meerut and I should have thought that a man wishing to build a house for himself would indicate that particular bigha of land which he chose as its site. Joti Swarup then went on in his evidence to describe how this bigha of land had been at first omitted in the engrossment and was subsequently added, together with Note no. 2, before execution and before attestation. He denies the events which are said to have taken place at Ghaziabad on the occasion of the attempted registration and says that the story of the subsequent inclusion of the Meerut property for the purpose only of obtaining a registration at Meerut is entirely untrue. The other witnesses are attesting witnesses; Chaudhri Ganga Sahai and Dalip Singh, each being one of the attesting witnesses at Meerut on the 26th August. Chaudhri Ganga Sahai is emphatic that the addition of the one bigha of land had been made before the 1922 mortgage was read out preparatory to execution and he professes to have remembered seeing Nazim Uddin sign it and also the two notes. The possible comment that can be made on this gentleman's evidence is that he is slightly over emphatic, having regard to the fact that he was recollecting in detail events which, from his point of view, were of no great importance, which occurred fifteen years earlier. The other witness, Dalip Singh, who also claims to have attested Nazim Uddin's signature at Meerut, went to the other extreme and was only prepared to say, after a good deal of hesitation, that he recollected that the addition of the Meerut property was on the document when it was executed and attested. The



same comment applies to this gentleman's evidence that these events took place a long time ago; but he is less emphatic about it than Chaudhri Ganga Sahai. On the other side, there was the evidence of Nazim Uddin himself in support of his own version of the story and he produced another witness, who was his mukhtar-e-am, to support it. That was the position as far as the actual evidence went; but, as I have said, the learned Civil Judge had not the document itself before him. This was not an easy question of fact for the Judge to solve. But in a careful judgment he came to the conclusion that Nazim Uddin's version was substantially right and he gave four reasons for so thinking. His first reason was that he found slight discrepancies between Joti Swarup's evidence and that of Chaudhri Ganga Sahai and Dalip Singh; secondly he felt that, if the Meerut property was actually in the 1922 mortgage when it was executed, it was unlikely, seeing that Meerut was much the more convenient place for registration, that they would ever have gone to Ghaziabad to get it registered. Thirdly, he found difficulty in believing the original omission in the draft, and, fourthly, he attached significance to the circumstances that, when the document was sent to Mussoorie on the 28th August to be executed by Ala Uddin, he was apparently never asked to sign the addition in the margin as well as Nazim Uddin. These reasons given by the learned Judge for his view are all reasons which merit consideration and it is not lightly that I should be prepared even in a first appeal, where admittedly the facts are open, to substitute a different judgment of my own for that of the Judge who saw and heard the witnesses. But to my mind the matter is concluded in favour of the learned Judge's view by the document itself. We have sent for it and it is demonstrably clear from it that the figure "1" before the word "note", together with the whole of the second note, have been added after the text of Note 1 had been written. There is a marked difference in the ink employed. I have no doubt that the whole of the second note was written after the text of Note 1 and that the figure "1" was at the same time added to the word "Note" for the first time. That in itself is not conclusive; but it is at least as consistent with the respondents' version as with the appellants'. But what turns the scale in favour of the respondents, in my view, is the fact that *both* Note 1 and Note 2 should have been signed by Nazim Uddin. If both the notes were on the document before the execution of it by Nazim Uddin, I should certainly not have expected to have found that Nazim Uddin should have signed *each* note. I should have expected him, *at the most*, to have

attached his signature once, and that after the second note. After all one does not sign each paragraph of a document when executing it. I can see no greater reason for signing each note. Looking at the evidence as a whole, I have come to the conclusion that the view of the facts taken by the learned Judge was a correct view and I certainly should not be disposed to come to any other conclusion myself in appeal.

[16] It has been suggested by Mr. Pathak on behalf of the appellants that we ought to be satisfied with neither version of these facts and that, therefore, we ought to leave the document to speak for itself. I am not satisfied that in view of the evidence which is available, we should be entitled to take that course. I shall, therefore, accept it that the 1922 mortgage, when it was executed and attested at Meerut on 26th August 1922, by Nazim Uddin, and at Mussoorie on 28th August by Ala Uddin, did not contain the Meerut property.

[17] It remains to be seen what the effect of this was. In my judgment, the effect can be simply stated. It was that, when the instrument was presented to the Meerut Registrar for registration on 12th September, it was an instrument which according to the requirements of S. 59, T. P. Act, 1882, mortgaged only the Ghaziabad property. Under S. 28, Registration Act, it was not a document capable of being registered at Meerut and it was not, therefore, legally registered there. It is, therefore, an unregistered mortgage, and as a mortgage it fails. I see no escape from that conclusion. No question of intention arises. On the facts of this case I should be unable to agree that in fact there was any intention that the Meerut property, which was relatively small in value, should be added to the security. No one has suggested that the security was inadequate. Indeed, there was on the story which I accept an express agreement to the contrary. But even if there had been an intention that the Meerut property should actually be mortgaged, it would have been quite immaterial, since what is required by S. 59, T. P. Act 1882, is not an intention to mortgage, but a formal compliance with the section in respect (among other things) of registration. That is where it has failed in this case and, as I see it, that has nothing to do with intention.

[18] That clears the ground for consideration of the remaining, and more difficult, questions arising out of these appeals. At this point we know that the 1922 mortgage has failed as a mortgage. At that stage Sir Tej Bahadur Sapru on behalf of the mortgagors says this. He is not interested in any question of priority as between the 1922 mortgagees and the 1921 mortgagees. He is interested in getting rid, not merely of



the 1922 mortgage as such, but also of any recourse by the 1922 mortgagees by survival to the 1916 mortgage on the failure of the 1922 mortgage. And for that purpose he puts his case in this way. He says that, as between the mortgagors and the 1922 mortgagees, the 1922 mortgage, when it was executed, whether it failed for lack of registration or not, totally absorbed and extinguished the 1916 mortgage. This must not be confused with any question of priority affecting the 1921 mortgage. Sir Tej says that on the execution of the 1922 mortgage there was a merger of the 1916 mortgage and that, on the failure of the former, it is not now open to the 1922 mortgagees to fall back on the 1916 mortgage—not for the purpose of protecting themselves against an intermediate mortgage—but for the purpose of attacking, and claiming directly against, the mortgagors. In support of this view, Sir Tej Bahadur has drawn our attention to many of those authorities, both English and Indian, which explain the well known *Adams v. Angell*<sup>1</sup> principles of keeping alive a subsequent mortgage as a 'shield' against an intervening encumbrancer. Those principles have been developed out of English equity and were accepted in India and are now embodied in the Transfer of Property Act. It is very true that, so far as the relations of a mortgagor and successive mortgagees are concerned, the question that invariably arises is in respect of the keeping alive of an original mortgage as a protection or 'shield' against an intervening encumbrancer, whether the case arises out of a subsequent mortgage in 'renewal' of an earlier one or of a purchase of an equity of redemption. The case of the discharge of an encumbrance by a tenant for life raises rather different considerations. No case has been referred to in which the doctrine of keeping alive an earlier security has, in the absence of some express provision, been inferred on the ground of intention directly as between mortgagor and mortgagee without reference to some intermediate incumbrance to be guarded against. Indeed, in Sir Dinshah Mulla's book on the Transfer of Property Act, 1882 (Edn. 2) at p. 552, he says in so many words:

"The only case in which it is to the benefit of a mortgagee or charge-holder to keep the incumbrance alive is when it is necessary as a defence against a subsequent incumbrance."

[19] Moreover, even in cases where, on the principles on which this doctrine and S. 101, T. P. Act, 1882, are founded, the presence of an intention to keep alive an earlier mortgage has to be proved or disproved, it is, I think, only the intention to effect some purpose or to guard against some contingency which can be foreseen at the date of the subsequent mortgage that is

1. (1877) 5 Ch. D. 634 : 46 L. J. Ch. 352.

material, and not any threat to the mortgage which may perhaps arise later against which it may suit his purpose to be protected. (See per Lord Lindley in *Liquidation Estates Purchase Co. v. Willoughby* (1896) 1 Ch. 726<sup>2</sup> at pp. 734/735. A fortiori it would seem difficult to suppose, therefore, that the doctrine would apply in a case of a failure of the subsequent mortgage through lack of registration.

[20] Though, therefore, I should be inclined to agree with Sir Tej Bahadur Sapru's argument that there is no room for the 'keeping alive' of the 1916 mortgage in the present case on the principles on which prior mortgages are sometimes kept alive as a 'shield', yet on two different grounds I think that the 1922 mortgagees must, in this case, be held to be able to have recourse to it.

[21] The first ground is that, in my opinion when the 1922 mortgage is closely examined, it is found that it expressly kept the 1916 mortgage alive. It was in fact never destroyed.

[22] The two material clauses of the 1922 document in this respect are cls. 11 and 13. Clause 11 reads :

"This document has been executed in place of the previous document, therefore the creditors shall have all the usual rights to the property hypothecated under this document which they had under the document dated 12th and registered on the 15th February 1916."

[23] Clause 13 reads :

"The creditors shall always have power to realise their money jointly or severally whenever and in whatever way they like, by enforcement of the prior hypothecation lien and by sale of the hypothecated property as also other moveable and immoveable property and from the person of executants No. 1. I shall have no objection thereto."

[24] Clause 13 seems to be a more or less common form clause since it also figures verbatim in the 1916 mortgage. We have been at some pains to verify the translation of it with the original and there seems no doubt that the translation of the clause as given at page 72 of the record of this appeal is substantially correct. Construing it as best I can, no other meaning can be given to cl. 13 than that it is an express clause keeping alive the 1916 mortgage. The words "by enforcement of the prior hypothecation lien" can refer only to the 1916 mortgage. It says in effect that notwithstanding the 1922 mortgage, the mortgagees shall always have a right to enforce the 1916 mortgage. That is nothing else than expressly keeping it alive. For this reason alone there is no necessity to examine the principles of keeping a subsequent mortgage alive as a 'shield' against an intervening mortgage, since in this case there is by express contract between the parties a provision for keeping it alive for the purpose of being enforced directly as against the mortgagors.

2. (1896) 1 Ch. 726 : 65 L. J. Ch. 486 : 74 L. T. 228  
44 W. R. 612.



[25] That, I think, would be enough to dispose of this contention on behalf of the mortgagors. But there is another ground on which the same result can be reached. Even assuming that the 1916 mortgage were absorbed in the 1922 mortgage as between the mortgagor and the mortgagees, even then on the authorities it would become a case, not, it is true, of "keeping alive" the 1916 mortgage, but of it being "revived" for the benefit of the 1922 mortgagees on the failure of the subsequent security. There is a world of difference between a doctrine or statute which "keeps alive" a prior security and a doctrine which acknowledges that it was already dead, but, in certain circumstances and for certain purposes, allows it to be "revived". The matter appears to me to be concluded in favour of the 1922 mortgagees by an authority of the Judicial Committee of the Privy Council arising out of a case in this Court, 39 ALL. 178.<sup>3</sup> In that case, a certain mortgagor and his nephew owned a mauza in the proportions of 5/6th by the mortgagor and 1/6th by his nephew. By a mortgage of 1876, the mortgagor mortgaged his 5/6th share. He then died leaving a widow. In 1879 and 1881 the nephew mortgaged his 1/6th of the same property to the same person who was mortgagee of the 1876 mortgage. In 1887 the widow of the original 1876 mortgagor and the nephew combined to execute two mortgages over the same property purporting to compromise the entire beneficial interest in it to the same mortgagee. The purpose of this transaction was, first, to pay off the principal and interest due on the 1876 mortgage, and, secondly, to pay off the principal and interest due on the nephew's mortgages of 1879 and 1881. In due course, the mortgagee in 1896 brought a suit to enforce his mortgage of 1881 and in that suit it was eventually held on appeal that the mortgage of 1887 was not binding on the widow. The question then arose whether, on the failure of the 1887 mortgage as far as the widow's 5/6th share was concerned, the mortgagee could fall back on the 1876 mortgage which it had been intended to replace. The Board held that the mortgagee could fall back on the 1876 mortgage on the ground that, the intention of the "consolidating" transaction of 1887 having been entirely frustrated by the circumstance that it had transpired the widow had no power to mortgage her 5/6th share, it would be altogether inequitable to deprive the mortgagee of the benefit of the prior mortgage on 1876 which the mortgage of 1887 had been intended to replace and for the extinc-

tion of which it had been the consideration. Their Lordships said :

"It is, of course, true that the mortgagee's intention at the time when the two deeds of 1887 were executed was to accept a new security, extending to the whole mauza, for the indebtedness both of Jai Chand and Phul Singh in lieu (*inter alia*) of the security of 13-11-1876. Pursuant to this intention, he appears to have handed over the mortgage of 13-11-1876 to Phul Singh. But the original intention of the mortgagee was entirely frustrated by the fact that the two deeds were held not to be binding on Mt Nandan, and it does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants, having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on Mt. Nandan, and consequently did not bind them as heirs of Jai Chand, should now claim the benefit of such transaction as a release of the mortgage of 13-11-1876."

[26] In my judgment, the circumstances of that case are in substance indistinguishable from those before us. The principle really is that a person cannot claim from a Court of Equity a benefit without accepting the just consequences of the relief he asks for. Where, therefore, a transaction is, at the instance and for the benefit of a party, declared for some reason to have failed, equity will not give him the *benefit* of that failure, unless he also assumes the logical *burden* of its consequences. In the case before us the mortgagors have themselves set up the failure of the 1922 transaction as a mortgage on the ground of want of registration. Their contention in that respect has been upheld. The purpose of the 1922 mortgage was admittedly to give to the 1922 mortgagees a fresh security in place of, and over the same property as was comprised in, the 1916 mortgage. If, therefore, the 1922 mortgage fails, the whole purpose of the transaction is as much defeated as was the case in the transaction before the Privy Council. On the same principle as their Lordships of the Judicial Committee have applied, it would, therefore, be contrary to equity and good conscience if the 1922 mortgagors in this case were now allowed to say that they are entitled to take the benefit of the setting aside of the 1922 mortgage without recognising the revived existence of the 1916 mortgage, which it had throughout been the intention of the parties that it should replace. This is expressed in a passage of Sir Dinshah Mulla's work on the Transfer of Property Act, 1882, by saying that, "if the higher security fails, the lower revives. If a mortgagee purchases the property mortgaged and the sale deed fails for want of registration . . . he can still fall back on the mortgage." This is something very different from the doctrine of 'keeping alive' the 1916 mortgage as a 'shield' against an intervening incumbrance. It is the very reverse of it, since it recognises that the 1916 mortgage did cease to exist, but is brought back to life because it has

3. (16) 3 A. I. R. 1916 P. C. 68 : 39 All 178 : 44 I. A. 60 : 39 I. C. 343 (P. C.), Harchandi Lal v. Sheoraj Singh.



been ascertained that the consideration for which it was destroyed has failed. It is a well settled principle that where persons enter into a transaction which, if followed, would have the effect, by implication or expressly, of rescinding a former contract and thereby inducing them to alter their relative position, and it turns out that the transaction cannot operate as the parties intended, then their rights under the former transaction remain unaffected. See (1866) 1 Ex. 117;<sup>4</sup> (1867) 2 Ex. 135<sup>5</sup> at p. 138; 43 Cal. 790<sup>6</sup> at p. 882 and 2 Bom. H. C. R. 198.<sup>7</sup>

[26A] It has been suggested that this principle should not operate in this case since the 1922 mortgagees were themselves parties to the deception of the Meerut Registrar which brought about the failure of the 1922 mortgage. But, on the facts as I have found them, the mortgagors themselves were as much parties to it as the 1922 mortgagees, and I can see no reason why, as between them, the principle acted on by the Judicial Committee should not be applied. They were in *pari delicto* and I cannot perceive any good reason why the mortgagors should now be heard to rely on the fraud in which they joined (if not which they themselves actually contrived) to say that *for their benefit* the other parties to that scheme should be deprived of their security. Nor can I see why, if the 1916 mortgage does revive and if it is still available notwithstanding the law of limitation, which is the only remaining matter to be discussed, it should not carry in favour of the 1922 mortgagees its full interest up to the time of the suit.

[27] It has been held, therefore, that on the facts the 1922 mortgage failed as a mortgage; but that, as between the 1922 mortgagees and the mortgagors, the effect of that failure was to "revive" the 1916 mortgage. The 1916 mortgage has been expressly pleaded by the 1922 mortgagees and a cause of action has been independently framed on it. That brings me, therefore, to the only remaining question in these appeals—the question of limitation.

[28] Sir Tej Bahadur Sapru on behalf of the mortgagors goes, as he has to go, the whole length of saying that there is no acknowledgment at all in the 1922 mortgage instrument which satisfies the provisions of S. 19, Limitation Act. The references to the 1916 mortgage in the 1922 mortgage instrument are these. In para. 8 it is expressed that the Ghaziabad property

" . . . . already stands pledged and hypothecated to the creditors under the document dated 12th and registered on 15-2-1916, in respect of the amount whereof this document has been executed . . . ."

[29] By para. 11 of the same document it is said that it

" . . . . has been executed in place of the previous document, therefore the creditors shall have all the usual rights to the property hypothecated under this document which they had under the document dated 12th and registered on 15-2-1916 . . . ."

[30] And by para. 13 it is said that :

"The creditors shall always have the power to realise their money jointly and severally whenever and in whatever way they like, by enforcement of the prior hypothecation lien . . . ."

[31] The mortgagors argue that this amounts to no "acknowledgment of the liability" and still less an "admission of liability". Even if it were an acknowledgment of liability it is suggested that it is an acknowledgment of a liability, not under the old mortgage of 1916, but only under the new mortgage of 1922 and that it is not enough to admit the liability under the new document alone. There must, it is said, be an admission of liability under the old document. We have been referred to the well known Indian case in 33 Cal. 1047<sup>8</sup> before the Judicial Committee of the Privy Council. The Board there explains S. 19, Limitation Act, in the sense that it requires only a definite admission of liability. They say that the requirement of an "acknowledgment" of liability under English law is, if anything, more stringent than the requirements of the Indian Limitation Act. What we have, therefore, to see is whether in the document of 1922 there is an acknowledgment of liability to pay, not merely what had then become due under the 1922 mortgage instrument, but what, assuming it were ever put in issue, was secured under the 1916 mortgage. I have already held that the 1916 mortgage was revived. The issue, therefore, now is whether anything is due under that instrument and we have to look for some acknowledgment that the mortgagors did owe money under it at the date of the 1922 document. This seems to me a matter of pure construction of the 1916 mortgage itself. Looking at the passages I have referred to above, I cannot doubt that they constitute an admission of liability under the 1916 mortgage. The first passage says that the Ghazizbad property was mortgaged by the 1916 mortgage "in respect of the amount whereof this document has been executed." That is an admission that, at the moment prior to the execution of the 1922 mortgage, the money secured by it was secured by the 1916 mortgage. In cl. 11 there is an admission that at the moment of the execution of the 1922 mortgage

4. (1866) 1 Ex. 117, *Noble v. Ward*.

5. (1867) 2 Ex. 135 : 36 L. J. Ex. 91 : 15 L. T. 672 : 15 W. R. 520, *Noble v. Ward*.

6. '16) 3 A. I. R. 1916 Cal. 136 : 43 Cal. 790 : 35 I. C. 305, *Mathura Mohan v. Ram Kumar*.

7. (1864-66) 2 Bom. H. C. R. 198, *Hira Chand v. Bhaskar Ababhat Shende*.

8. ('06) 33 Cal. 1047 : 2 Nag. L. R. 130 : 33 I. A. 165 (P. C.), *Mani Ram v. Seth Rupchand*.



there was a subsisting mortgage of 1916, since otherwise the former could not have been executed "in place of" the latter. And by cl. 13 there is again a clear implied admission that money was then due under the 1916 mortgage. It seems to me that it is extremely difficult in face of these passages to suggest that there was in the 1922 document no admission of liability under the 1916 instrument at the moment it was executed. That being so, the second mortgagees' suit, so far as it is a suit based on the 1916 mortgage, was not, in my opinion, barred by the Limitation Act.

[32] There remains then the final question of the effect of S. 19, Limitation Act, as between the 1922 mortgagees and the 1921 mortgagees. This question I propose to deal with shortly, because it is, in my opinion, concluded by authority. The point at issue is whether the acknowledgment, which has been held to have been given by the 1916 mortgagors to the 1922 mortgagees in the 1922 instrument, was effective as an acknowledgment under S. 19, Limitation Act, to start a fresh period of limitation in favour of the 1922 mortgagees, not merely as against the 1916 mortgagors themselves, but as against the 1921 mortgagees who derived their title from the mortgagors, prior to the acknowledgment, out of the equity of redemption on the 1916 mortgage. That the 1922 mortgage instrument was capable of being used as acknowledgment, notwithstanding that it had failed as a mortgage, is clear from S. 49, Registration Act, and the authorities on the point decided under it.

[33] In my judgment the answer to this question is contained in the well-known judgment of the late Sir Asutosh Mukerji in 1 C. L. J. 337,<sup>9</sup> which was sealed with the approval of the Judicial Committee of the Privy Council in the case from our own Court in 1942 A. L. J. 648.<sup>10</sup> Sir Asutosh Mukerji founding himself on the reasoning of Lord Westbury in (1862-63) 1 De. J. & S. 122,<sup>11</sup> held that, on the proper construction of S. 19, Limitation Act, it did not allow a mortgagor, after he had created a second mortgage and thus ceased to represent the *entirety* of the equity of redemption, to compromise the position of his own second mortgagee in point of limitation by an acknowledgment given behind his back in favour of the first mortgagee. The case with which Sir Asutosh Mukerji was dealing was also a case of successive mortgagees,

in which the mortgagor, by creating the second mortgage, had not parted with his entire interest in the mortgaged property. He retained his ultimate equity of redemption. It is true that in 1942 A. L. J. 648<sup>10</sup> the Judicial Committee was dealing with a case, not of successive mortgages, but of a purchase by a first mortgagee outright of an equity of redemption and their Lordships, therefore, confined their decision in terms to a case in which the mortgagor had given an acknowledgment after he had parted with his entire interest in the equity of redemption. But the reasoning is general; and, indeed, they expressly said that they were "prepared to adopt the reasoning of that very learned Judge"—meaning Sir Asutosh Mukerji—"in the present case." I can see no reason why, once a construction of the actual words of S. 19, Limitation Act, has been reached which limits the effect of an acknowledgment given by a mortgagor after he has parted with his entire equity of redemption by sale, exactly the same construction should not apply to a case in which he has merely carved a further mortgage out of his equity of redemption. To allow him to derogate from his own grant by defeating his own mortgage by an acknowledgment would in that case also, in my opinion, be doing the very thing which Lord Westbury described as "taking away the right of one man by the act of another" and would involve a consequence "inconsistent with natural justice." I am aware that a different view was at one time taken in some other Courts of which an example was the view in 1932 expressed in the Madras Bench case in 55 Mad. 758.<sup>12</sup> But even in that Court in a later Full Bench case in I. L. R. (1940) Mad. 872,<sup>13</sup> in dealing with the case of a mortgagee who had parted with his whole interest in the equity of redemption by transfer, the learned Chief Justice of the Madras High Court observed that

"... In certain of the cases to which I have referred the mortgagor retained an interest in part of the mortgaged property sold, but I do not consider this makes any difference in principle."

[34] In my view it makes no difference in principle. That also has been the still more recently expressed conclusion of a Full Bench of the Nagpur High Court in I. L. R. (1944) Nag. 383.<sup>14</sup>

[35] In spite of this, Mr. Pathak on behalf of the 1922 mortgagees has pressed us with a very

9. ('05) 1 C. L. J. 337, Surjiram Marwari v. Barhamdeo Prasad

10. ('42) 29 A.I.R. 1942 P. C. 67 : I. L. R. (1942) All. 660 : I. L. R. (1942) Lab. 686 : I. L. R. (1942) Kar. P. C. 153 : 69 I. A. 130 : 202 I. C. 740 : 1942 A. L. J. 648 (P. C.), Bank of Upper India Ltd. v. Skinner.

11. (1862-63) 1 De. J. & S. 122 : 32 L. J. Ch. 219 : 7 L. T. (N. S.) 812 : 11 W. R. 386, Bolding v. Lane.

12. ('32) 19 A. I. R. 1932 Mad. 516:55 Mad. 758 : 138 I. C. 632, Muthu Chettiar v. Muthuswami Ayyangar.

13. ('40) 27 A. I. R. 1940 Mad. 470 : I. L. R. (1940) Mad. 872 : 188 I. C. 603 (F.B.), Pavayi v. Palanivela Goundan.

14. ('44) 31 A.I.R. 1944 Nag. 163:I. L. R. (1944) Nag. 383 : 216 I. C. 296 (F.B.), Radha Kishan v. Hazarilal.



recent decision of this year of a Full Bench of five Judges of our own High Court in 1945 A.L.J. 292.<sup>15</sup> This Full Bench reference arose out of an appeal from a decision of my own and I should, therefore, desire to discuss it no further than is necessary. Primarily it raised a question of subrogation involving a consideration by the Court of the language and effect of S. 92, Transfer of Property Act, 1882. But there was undoubtedly involved in the case the question from the point of view of limitation of the effect of a subsequent mortgagee acquiring the "rights and powers" of a prior mortgagee by subrogation under that section. It was held by three of the five learned Judges who composed the Full Bench that the effect of a subsequent mortgagee acquiring by subrogation under the section "all the rights and powers" of a prior mortgagee was to start a new period of limitation in his favour from the date of the subsequent transaction. Of the three learned Judges who took that view one of them at least used language which made it quite clear that he had no intention of disregarding the doctrine which the Judicial Committee of the Privy Council had approved in 1942 A. L. J. 648<sup>10</sup> (*ubi supra*) in its application to the case of an acknowledgment, as opposed to a case merely of subrogation. Allsop J. in his judgment made this quite clear. He said :

".... Our attention has been drawn to the fact that it is now settled that a mortgagor cannot extend limitation against a puisne mortgagee by an acknowledgment alone and it must be admitted that the equities are some what complicated but we are to decide the question before us not on general principles but on the meaning we impute to S. 92...."

[36] As I read that passage, the learned Judge appears to have recognised that the law was settled in a case of acknowledgment, as opposed to a case of subrogation and he very carefully rested his decision on S. 92, Transfer of Property Act, alone. The two learned dissenting Judges also both accepted the authority of Sir Asutosh Mukerji's reasoning, as approved by the Judicial Committee of the Privy Council in 1942 A. L. J. 648,<sup>10</sup> as conclusive of the view that a mortgagor cannot, under S. 19, Limitation Act, give an acknowledgment so as to affect behind his back the rights of a subsequent mortgagee acquired before that acknowledgment is given. For these reasons I cannot regard this Full Bench case as in any way affecting the law relating to the effect of an acknowledgment in such a case as that involved in these appeals. No authority has been produced before us which would lend me the courage, even if I thought it right to do

so, (which I do not), to depart from the reasoning of Lord Westbury in (1862-63) 1 De. J. & S. 122<sup>11</sup> (*ubi supra*) in its application to the case of an acknowledgment where the mortgagor has retained an interest in the form of an equity of redemption in the mortgaged property.

[37] The result, therefore, of these appeals is that on the facts the mortgage of 1922 failed as a mortgage for want of registration. The result of that was to 'revive' the 1916 mortgage in favour of the 1922 mortgagees. There was a sufficient acknowledgment in the 1922 mortgage instrument to save the cause of action under the 1916 mortgage; and that cause of action the 1922 mortgagees have expressly pleaded. But, as between the 1922 mortgagees and the 1921 mortgagees, no acknowledgment given by the mortgagors in the 1922 mortgage would be effective to displace the accrued rights of the 1921 mortgagees in respect of limitation. For these reasons, in my opinion, the learned Civil Judge was right in giving the 1922 mortgagees a decree in suit No. 12 of 1934 on the 1916 mortgage, subject only to the principal, interest and costs secured to the 1921 mortgagees under their mortgage of 1921. The Appeal No. 468 of 1937 must, therefore, in my opinion, be dismissed with costs. For the same reasons the Appeal No. 197 of 1938 should also be dismissed with costs. The cross-objections of the mortgagors in both appeals must be dismissed with costs. There will be the usual set-off as to costs.

[38] **Wali Ullah J.** — I agree.

[39] **By the Court.**— The Appeal No. 468 of 1937 must be dismissed with costs. For the same reasons the Appeal No. 197 of 1938 should also be dismissed with costs. The cross objections of the mortgagors in both appeals must be dismissed with costs. There will be the usual set-off as to costs.

N.S./D.H.

*Appeals and Cross-objections dismissed.*

[C. N. 98.]

**\*\* A. I. R. (34) 1947 Allahabad 225**

**FULL BENCH**

**YORKE, SANKER SARAN AND RAGHUBAR  
DAYAL JJ.**

*Deo Suchit Rai and another — Applicants  
v.*

*Emperor.*

Cri. Revn. No. 408 of 1946, Decided on 21.11.1946.

\*\* (a) Penal Code (1860), S. 215 — Actual thief or person suspected to be the thief can be convicted under S. 215 : 23 All. 81 ; 50 All. 186 : 15 A. I. R. 1928 All. 22 : 106 I. C. 437 and 54 All. 55 : 18 A. I. R. 1931 All. 710 : 133 I. C. 800, **OVER-ruled.**

An actual thief or a person suspected to be the thief can be convicted under S. 215. There is nothing in that

15. ('45) 32 A. I. R. 1945 All. 239 : I. L. R. (1945) All. 733 : 1945 A. L. J. 292 (F.B.), Munna Lal v. Chunni Lal.



section which should exclude an actual thief from liability under it if, in addition to committing theft, he also tried to realise money by a promise to return the stolen article. Such an act which is independent of the act of stealing constitutes a different offence. There is no reason why a thief be not punishable for an additional offence. The earlier part of the section which really describes the ingredients of the offence does not lend support to the view that the thief cannot be prosecuted under it. The latter part of the section is really in the nature of a provision by way of a concession in favour of one who helps, though for personal gain, both in recovering the stolen property, and in bringing the thief to book : 23 All. 81 ; 50 All. 186 : 15 A. I. R. 1928 All. 22 : 106 I. C. 437 and 54 All. 55 : 18 A. I. R. 1931 All. 710 : 133 I. C. 800, *OVER RULED*; *Case law discussed.* [Para 4]

\*\* (b) Penal Code (1860), S. 215 — Onus is on accused to prove that he did all in his power to cause offender to be apprehended : 54 All. 55 : 18 A. I. R. 1931 All. 710 : 133 I. C. 800, *OVER RULED*.

In a prosecution under S. 215 it is not for the prosecution to prove the negative that the accused did not use all in his power to cause the offender to be apprehended. It is for the defence to establish the positive fact that they did all in their power to cause the offender to be apprehended. Hence a conviction under S. 215 can be maintained even if there is no evidence to prove that the accused did not use all means in his power to cause the offender to be apprehended and convicted of the offence : 54 All. 55 : 18 A. I. R. 1931 All. 710 : 133 I. C. 800, *OVER RULED*; *Case law discussed.* [Paras 15, 2]

#### Cases referred :—

1. ('01) 23 All. 81, *Queen-Empress v. Muhammad Ali*.
2. ('24) 46 All. 915 : 11 A. I. R. 1924 All. 783 : 85 I. C. 225, *Emperor v. Mukhtara*.
3. ('25) 50 All. 186 : 15 A. I. R. 1928 All. 22 : 106 I. C. 437, *Emperor v. Mangu*.
4. ('32) 54 All. 55 : 18 A. I. R. 1931 All. 710 : 133 I. C. 800, *Emperor v. Ram Naresh Rai*.
5. ('14) 24 I. C. 351 : 1 A. I. R. 1914 Mad. 121, *In re Nalli Veerathevan*.
6. ('38) 17 Pat. 677 : 25 A. I. R. 1938 Pat. 590 : 177 I. C. 344, *Ramanand Teli v. Emperor*.
7. ('41) 1941 R. L. R. 582 : 28 A. I. R. 1941 Rang. 340 : 198 I. C. 766, *King v. Nga Po Nyein*.
8. ('07) 4 L.B.R. 199 (F.B.), *Twet Pe v. King-Emperor*.
9. ('93-1900) L. B. R. (P. J.) 226, *Queen Empress v. Nga Tun Byu*.
10. ('38) I. L. R. 1938 All. 681 : 25 A. I. R. 1938 All. 440 : 176 I. C. 785, *Emperor v. Yusuf Mian*.
11. ('33) 20 A. I. R. 1933 Cal. 599 : 145 I. C. 569, *Arman Ulla v. Jainullah*.
12. ('41) 1941 A. L. J. 619 : 28 A. I. R. 1941 All. 402 : I. L. R. (1941) All. 843 : 197 I. C. 525 (F. B.), *Parbhoo v. Emperor*.

*R. N. Verma* — for Applicants.

*Deputy Government Advocate* — for the Crown.

**Sanker Saran J.**—The two applicants, Deo Suchit Rai and Bhola Ahir, were convicted by a Magistrate for an offence under S. 215, Penal Code. The learned Sessions Judge dismissed their appeal. They came up to this Court in revision and I referred the revision to a Full Bench because of the divergence of opinion in this Court and other Courts on questions which will be set out presently.

[2] One Bhaja Singh lost his buffalo and

after looking for it in vain for two days, he met the two applicants who told him that his buffalo was stolen and if he chose to spend Rs. 150 the buffalo could be restored to him. On Bhaja Singh pleading poverty, the bargain was struck at Rs. 60. In pursuance of that agreement, Bhaja Singh paid Rs. 60 on 28.6.1945, and on 30th of June, the two applicants and another person returned the buffalo to Bhaja Singh. On behalf of the accused applicants there was a denial of the prosecution allegation. It was, however, argued in this Court, (1) that the accused himself might be the thief and then S. 215 would not be applicable, (2) that even though he was not the thief, he could not be convicted unless the prosecution were able to prove that "he did not use all means in his power to cause the offender to be apprehended and convicted of the offence." Upon these facts, two questions were referred to the Full Bench :

(1) Can the accused be convicted under S. 215, Penal Code, if he himself was the thief ?

(2) Can the conviction under that section be maintained unless there is evidence to prove that the accused did not use all means in his power to cause the offender to be apprehended and convicted of the offence ?

[3] Before embarking upon a discussion of the decided cases it is desirable to examine the terms of S. 215, Penal Code. It runs as follows:

"Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any moveable property of which he shall have been deprived by any offence punishable under this Code, shall unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

[4] It is the duty of Courts of law to interpret an enactment as it stands. There is nothing in this section which should exclude an actual thief from liability under it if, in addition to committing theft, he also tried to realise money by a promise to return the stolen article. Such an act which is independent of the act of stealing constitutes a different offence. There is no reason why a thief be not punishable for an additional offence. The only reason for the view that a thief cannot be held guilty under this section is the fact that it is unnatural for a thief himself to use all means in his power to cause himself to be apprehended and convicted for theft. But the language of the section does not contemplate any exception. The earlier part of the section which really describes the ingredients of the offence does not lend support to the view that the thief cannot be prosecuted under this section. The latter part of the section is really in the nature of a provision by way of a concession in favour of one who helps, though for personal gain, both in recover-



ing the stolen property, and in bringing the thief to book. In my judgment, an actual thief or a person suspected to be the thief can be convicted under S. 215, Penal Code.

[5] The case law on the point has not been uniform. There has been a conflict of authority. The trend of the recent decisions, however, seems to favour the view expressed above. The first case of our Court directly in point which has been referred to in many of the subsequent judgments is reported in 23 ALL 81.<sup>1</sup> It was a case where the accused were convicted of an offence under S 380, Penal Code, for stealing four heads of cattle. They were further found to have taken Rs. 50 from the owner for returning two of the stolen cattle. For this offence, they were convicted under S. 215. Aikman J. held that Section 215,

"was never intended to apply to the actual thief, but to someone who being in league with the thief, received some gratification . . . without at the same time using all the means in his power to cause the thief to be apprehended and convicted of the offence."

Upon this view of the section, he set aside the conviction under S. 215. I might mention that there was no discussion of the interpretation of the section.

[6] In a later case reported in 46 ALL. 915<sup>2</sup> a Bench of this Court considered 23 ALL. 81<sup>1</sup> and did not accept the view expressed therein. In this case, two bullocks were stolen and Mukhtara was suspected of theft. At any rate, he was suspected of being in the know of who the thieves were. He told a *panchayat* that he would recover the bullock on payment of Rs. 30. He received the money and three days later he produced the bullock. Ryves, J. held that

"The inference is irresistible that he knew who the thieves were. There is a considerable amount of suspicion (to say the least of it) that Mukhtara himself was the thief, or one of the thieves. But the Magistrate did not take that point into consideration holding that according to the case in 23 All 81,<sup>1</sup> the thief himself could not be convicted under S. 215."

The Bench held that Mukhtara was rightly convicted under S. 215. Of the two Judges, Ryves, J. expressed his doubt regarding the correctness of the decision in 23 ALL. 81.<sup>1</sup> Walsh, J. took a stronger line. He said :

"I am definitely of opinion that it is not good law and ought not to be followed. The learned Judge who decided it was probably embarrassed by the fact that there had been a conviction against the thief for both offences. But what he appears to have overlooked is this. Take the ordinary case of a man against whom suspicion is strongly entertained, as in this case. The complainant may be in doubt as to whether he is the guilty person or whether he is not, but he does not mind so long as the person he suspects agrees to return the animal for a consideration. Can it be seriously suggested that when the charge under S. 215 comes into Court, and the complainant confines his allegation as regards the theft to mere suspicion, the accused can be heard to say "The complainant is wrong to confine

his allegation to mere suspicion. I am the thief. I have always been in a position to confess the theft, and if it suited my purposes, to provide the complainant with means for proving my guilt. But the High Court has decided that this section does not apply to the thief, and I being the thief it does not apply to me, and I am entitled to an acquittal. It seems to me that this would be a *reductio ad absurdum*."

[7] In a later Bench case reported in 50 ALL. 186,<sup>3</sup> a contrary view seems to have been taken. There are no references to any of the previous decisions in this case. Reliance is placed on certain general principles of law as expounded by Mayne in Edn. 4, of his work on Criminal law in India. Mr. Mayne was of the opinion that the section was not intended to apply to the actual thief. This view the learned Judges accepted and went on to say that "being in league with the thief" is a necessary fact to be proved. Having made these general observations, they went on to discuss the merits of the case. Upon the facts, the findings of the Court were that the prosecution failed because there was no evidence that the horses had been stolen and further there was certainly no evidence that Mangu, the accused, knew the criminal. Again, there was no evidence that he was making any attempt to screen that criminal from justice, or that he failed to use all means in his power to cause the offender to be apprehended. On the findings in this case, it cannot be said that the principles in 46 ALL. 915<sup>2</sup> were not followed or distinguished. As a matter of fact, 46 ALL. 915<sup>2</sup> was not considered by the Judges in this case. In a subsequent case reported in 54 ALL. 55<sup>4</sup> a single Judge referred to 50 ALL. 186<sup>3</sup> and also 46 ALL. 915.<sup>2</sup> He seems to have relied on 50 ALL. 186<sup>3</sup> and distinguished 46 ALL. 915.<sup>2</sup>

[8] In a Madras case, 24 I. C. 351,<sup>5</sup> a single Judge followed 23 ALL. 81,<sup>1</sup> without any discussion. In a Patna case, 17 Pat. 677,<sup>6</sup> the decision in 46 ALL. 915<sup>2</sup> was accepted in the following terms :

"The first contention raised was that the accused may be themselves thieves, and in that event S. 215 should not be held to be applicable to them. In the Allahabad High Court this view was at one time held, but the law is now held in that Court to be as laid down in 46 All. 915,<sup>2</sup> which, in my opinion, correctly states the law. A person suspected of theft may, if the prosecution fails to prove the fact of theft by him, be convicted under S. 215."

In a Rangoon case, 1941 Rang. L. R. 582,<sup>7</sup> this question was thoroughly considered by a Judge who followed 46 ALL. 915<sup>2</sup> which had dissented from 23 ALL. 81.<sup>1</sup> In the course of the judgment, the learned Judge observed :

"It does not appear to me to be correct to say as Fox C. J. said in 4 L. B. R. 199<sup>8</sup> that the section does not apply to the actual thief because he is under no legal obligation to bring himself to justice. All that the section says is that the person who takes the gratification shall be punished unless he uses all means in his



power to bring the actual thief to justice. No doubt the wording of the section makes it apply in the majority of cases to offenders other than the actual thief. But cases may well occur, as was pointed out by Aston J. C. in (1893-1900) P. J. L. B. R. 226,<sup>9</sup> where a thief having stolen cattle without a view to obtain money by restoring them to the owner, may offer to restore them for a gratification merely because he knows that detection is becoming imminent."

[9] Having examined the terms of the section and the authorities on the subject with regard to question No. 1, I am of the opinion that the view in 23 ALL. 81<sup>1</sup> as also in 50 ALL. 186<sup>3</sup> is not good law. I would, therefore, answer it in the affirmative.

[10] With regard to question No. 2, there is a discussion in some of the cases referred to above on this point. In 54 ALL. 55,<sup>4</sup> Bajpai J. held that it was for the prosecution to prove that the accused did not take steps to have the accused apprehended. He expressed himself as follows :

"Where the accused merely undertakes the endeavour to trace out and restore the lost property on payment of some remuneration, then upon this circumstance alone the accused cannot be said to be guilty of an offence under S. 215, Penal Code, unless over and above that the prosecution proves that the property has been lost by the commission of an offence and that the accused is endeavouring to screen the offender from justice and is not using all means in his power to cause the offender to be apprehended and convicted of the offence which he has committed."

[11] In I. L. R. (1938) ALL. 681<sup>10</sup> Allsop J. after considering the authorities of this Court and of other Courts took a contrary view and observed :

"In 50 All. 186<sup>3</sup> the learned Judges certainly made use of expressions from which it might be inferred that they were of opinion that nobody could be convicted of an offence under S. 215, Penal Code, unless he knew who the offender was, but they were discussing the particular facts of that case and I do not suppose for a moment that they meant to lay down as a general rule of law that knowledge of the offender was a necessary ingredient of that offence. There is not one word in the section that suggests that such knowledge is necessary."

The learned Judge further goes on to say :

"It has been held by two Judges of the High Court at Calcutta in A. I. R. (1933) Cal. 599<sup>11</sup> that the burden of proving under S. 215, Penal Code, that the accused person used his best endeavours or the means in his power to cause the offender to be apprehended and convicted of the offence is upon him. This also seems to be the conclusion to be drawn from the provisions of the Indian Evidence Act. The clear meaning of the section in my judgment is that it is an offence to receive money for helping any person to recover property stolen or misappropriated and that there is an exception only in favour of a man who can show that he used all means in his power to cause the apprehension of the offender. Under the provisions of S. 105, Evidence Act, where a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any special exception or proviso contained in the Code or in any law defining the offence is upon him and the Court shall presume the absence of such circumstances."

[12] The Calcutta case in A. I. R. 1933 Cal. 599<sup>11</sup> on which reliance was placed in I. L. R. (1938) ALL. 681<sup>10</sup> laid down :

"Once the elements of an offence under S. 215 have been established by evidence the onus of proving that the person charged is entitled to the benefit of the exception referred to above is on the defence."

[13] This question was also discussed in 17 Pat. 677<sup>6</sup> where the view was expressed that the saving clause in S. 215 is in the nature of an exception and the onus of proving that the accused is entitled to the benefit of exception is on him.

[14] With regard to the question of onus of proof in such cases, the Full Bench case in 1941 A. L. J. 619<sup>12</sup> exhaustively deals with it. This was a case which was heard by seven Judges and the majority view, which is the view of the Court, was that although the burden of proving the existence of circumstances bringing the case within one of the "exceptions" was on the accused, the prosecution would not be relieved of the burden of proving the entire "proceedings." In the words of Iqbal Ahmad, C. J.

"the burden of proof, so far as the entire 'proceeding' is concerned, remains on the prosecution, even though the burden of the 'fact in issue' pleaded by the accused is cast upon him by S. 105."

The prosecution having tendered evidence regarding the theft of the buffalo and the demand of money for its restoration, the simple fact that the defence was called upon to prove was that the accused did all that lay in his power to cause the offender to be apprehended.

[15] Thus with the view expressed in I. L. R. (1938) ALL. 681<sup>10</sup> I am in respectful agreement. In my judgment, it is not for the prosecution to prove the negative that the accused did not use all in his power to cause the offender to be apprehended. It is for the defence to establish the positive fact that they did all in their power to cause the offender to be apprehended. In effect, my view is that the decision in 54 ALL. 55<sup>4</sup> was not correctly made. I would, therefore, answer question No. 2 in the affirmative. In the result, the application in revision should be dismissed.

**Yorke J.** — I agree. The revision application should be dismissed accordingly.

**Raghubar Dayal J.** — I agree the revision application be dismissed.

**By the Court :** The revision application is dismissed.

G.N.

*Application dismissed.*



**A. I. R. (34) 1947 Allahabad 229 [C. N. 99.]****MALIK AND WALI ULLAH JJ.***Sheo Dutt and others — Plaintiffs — Appellants v. Pushi Ram and others — Defendants — Respondents.*

First Appeal No. 28 of 1943, Decided on 27-3-1946, from decision of Temporary Sessions and Civil Judge, Benares, D/- 3-11-1942.

(a) Partnership Act (1932), S. 69 (3) (a) — S. 69 (3) (a) includes claim for money due to dissolved firm either by partner or by third party—Unregistered dissolved firm—Suit by one partner against other to recover amount overdrawn by latter from partnership assets and latter's share of loss incurred by partnership is one to recover property of dissolved firm within S. 69 (3) (a).

The words "any right or power to realise the property of a dissolved firm" in S. 69 (3) (a) include the right to recover the property from a third party or from a partner from whom the property may be recoverable and the word "property" must be interpreted to include a claim for money : 26 A.I.R. 1939 All. 735 (S.B.) and 25 A. I. R. 1938 Bom. 108, *Rel. on*; 26 A. I. R. 1939 All. 535, *held overruled in* 26 A. I. R. 1939 All. 735 (S.B.); 24 A. I. R. 1937 Bom. 225, *Disting.*

[Paras 16 and 17]

Hence, a suit by A, the partner of an unregistered dissolved firm, against B, the other partner, to recover (1) the sum which was overdrawn by B from the partnership assets and (2) the amount which was B's share of the loss incurred by the partnership is a suit to recover the property of a dissolved firm within the meaning of the exception contained in S. 69 (3) (a).

[Para 18]

(b) Partnership Act (1932), S. 69 (1), (2) and (3)—S. 69 (1) and (2) relate to existing as well as dissolved unregistered firm and bar all suits by such firm or partner thereof unless they come within exceptions in S. 69 (3).

Section 69 (1) and (2) relate not only to an unregistered firm which is in existence but also to a firm which has been dissolved and bar all suits by or on behalf of an unregistered firm or by or on behalf of a partner in an unregistered firm unless they come within one of the exceptions mentioned in S. 69 (3).

[Para 17]

(c) Civil P. C. (1908), O. 7, R. 7—Suit by partner of dissolved firm against other partner for specific sums of money on the allegation that accounts had been settled — Accounts found not to have been properly settled—Court can pass decree for accounts—Partnership Act (1932), S. 48.

Where a partner in a dissolved firm brings a suit against other partners in the firm to recover specific sums of money on the allegation that the accounts were gone into and the sums were found due to him the Court can pass a decree for accounts if it is not satisfied that there was a proper settlement thereof and it is not necessary that the suit should be withdrawn by the plaintiff or dismissed by the Court on the ground that the relief claimed was not the proper relief.

[Para 20]

Civil P. C.—('44-Com.) O. 7, R. 7, N. 2, Pt. 21.

(d) Partnership Act (1932), S. 69 — Trade mark of unregistered dissolved firm private property of one of partners A — After dissolution A renting trade mark to B, other partner of firm, to be used by B for his own business—Suit by A against B to recover rent for hire of trade mark does not come under bar of S. 69.

A the partner of an unregistered dissolved firm which had carried on a business in hemp brought a suit against B the other partner of the firm on the allegation that the trade mark of the firm was the private property of the plaintiff; that after the dissolution of the partnership B used the trade mark on 5200 bales of hemp for the purpose of B's own business for which he had agreed to pay to the plaintiff A at the rate of two annas per bale. A claimed Rs. 650 as the rent for the hire of the trade mark :

*Held* that the suit did not come under the bar of Section 69. [Para 18]

*Cases referred :—*

1. ('39) 1939 A. L. J. 405 : 26 A. I. R. 1939 All. 535 : I. L. R. (1939) All. 563 : 184 I. C. 160, Magan Behari Lal v. Ram Partap Singh.
2. ('39) 1939 A. L. J. 964 : 26 A. I. R. 1939 All. 735 : I.L.R. (1940) All. 26 : 185 I.C. 113 (S.B.), Shibba Mal v. Gulab Rai.
3. ('38) I. L. R. (1938) Bom. 102 : 25 A. I. R. 1938 Bom. 108 : 173 I. C. 766, Appaya Nijlingappa v. Subrao Babaji.
4. ('37) I. L. R. (1937) Bom. 628 : 24 A. I. R. 1937 Bom. 225 : 169 I. C. 424, S. H. Patel v. Husseinbhai Mahomed.

*Mushtaq Ahmad* — for Appellants.

*K. N. Srivastava and Krishna Shankar* —

for Respondents.

**Malik J.**—This appeal has been filed by the plaintiffs whose suit for recovery of Rs. 8567-3-9 from defendant 1, Pushi Ram, was dismissed by the Temporary Civil and Sessions Judge of Benares on 3rd November 1942. The plaintiffs' allegations in the plaint were that there was a partnership entered into between Vidhya Dhar, their predecessor, and Pushi Ram, Raj Narain Singh and Ram Nath Misra, defendants, on 15th April 1935. The partnership was to carry on business in hemp in the name of Deodutta and Baldeo Prashad at Sheopur, Benares. Vidhya Dhar was to provide the entire money required by the partnership and was to get interest at the rate of ten annas per cent. per mensem on the money invested by him. The other three were to be only working partners in the business and the profits and losses were to be shared equally between the four partners. Vidhya Dhar died after the institution of the suit as a member of a joint Hindu family and the plaintiffs, whose names were substituted after his death, claimed that they were members of a joint Hindu family with him and that he had entered into the partnership on behalf of the family.

[2] I may mention that in the plaint when it was originally filed the date of commencement of the partnership was given as 29-9-1936. By an amendment made on 26-9-1942, the Hindi date was changed from Bhadon 2, Sudi 14, Sambat 1993 to Chait Sudi 12, Sambat 1992, but no correction was made in the English date: the corresponding English date would be 15-4-1935.

[3] According to the plaintiffs the partnership was dissolved on 9-10-1938, and it was found



that the losses amounted to a sum of Rs. 5939-0-9. One-fourth of this loss was Rs. 1484-12-3 which was said to be the share of defendant 1. It was further alleged that the defendant had overdrawn to the extent of Rs. 6756-5-0 out of the partnership assets. These two sums were claimed from defendant 1 after giving him credit for his one-fourth share of Rs. 679-8-0 which, according to the allegations in the plaint, para. 8, was improperly and without any right entered in the loss account. Thus, a sum of Rs. 1314-14-3 under the first head as loss and a sum of Rs. 6756-5-0 under the second head as money overdrawn was claimed from defendant 1.

[4] It was further alleged that after the dissolution of the partnership defendant 1 used the trade mark belonging to the plaintiffs on 5200 bales of hemp for the purpose of defendant 1's own business for which he had agreed to pay to the plaintiffs at the rate of two annas per bale. A sum of Rs. 650 was claimed as the rent for the hire of the trade mark. It was further alleged in the plaint that Raj Narain Singh and Ram Nath Misra had settled the matter out of Court, that they were being impleaded as pro forma defendants and that no relief was claimed against them. The plaintiffs claimed a sum of Rs. 8070-10-3, principal, and Rs. 496-9-6 as in interest against Phusi Ram defendant 1.

[5] The defence on behalf of defendant 1, Phusi Ram, was a total denial of the partnership and it was alleged that he was working as a servant and that he had nothing to do with the losses of the partnership. It was further alleged that the firm Deodutta Baldeo Prasad at Sheopur was merely a branch of a firm of that name in Muhalla Raja Darwaza in the city of Benares and that it had branches at Mogal Sarai and other places. In the written statement it was mentioned that the defendant was a servant and *munim* of the firm and was entitled to a four anna share as profits in lieu of his remuneration. Later on in the evidence the case was developed that in case one-fourth of the profits was less than Rs. 2000 per annum, the defendant was to get a sum of Rs. 2000 as remuneration, that is, the defendant's remuneration was a minimum sum of Rs. 2000 per annum.

[6] Ram Nath Misra, defendant 3, did not enter appearance. Raj Narain Singh, defendant 2, filed a written statement in which he alleged that he had nothing to do with the partnership. He was working merely as a servant and was not responsible for the loss in the business.

[7] The lower Court framed eight issues and held on all questions of fact in favour of the plaintiffs, but on the last question, that is, on

issue No. 8, it held that the suit was barred by S. 69, Partnership Act, and dismissed the suit; but as the suit failed on a purely technical ground, the defendant was allowed half his costs.

[8] The plaintiffs have filed this appeal and learned counsel on their behalf has urged that, as it was a suit to realise the property of a dissolved partnership, the suit was not barred by S. 69, Partnership Act. Learned counsel for the respondent has, however, challenged before us all the findings of fact, and it will, therefore, be necessary for us first to consider the question whether the defendant, Phusi Ram, was a partner and whether any sum was due to the firm from him.

[9] Learned counsel for the respondent has placed great reliance on the fact that the plaintiffs originally in their plaint gave 29-9-1936, as the date when the partnership was started and then later changed it to 15-4-1935. He has also drawn our attention to a document dated 6-11-1940, entered into between some of the plaintiffs or their predecessors and Ram Nath, defendant 3, in which it was mentioned that the business was started at Sheopur on 29-9-1936, and had terminated on 13-10-1937. It would appear that both these dates of commencement and termination of the business differ from the dates given in the plaint. It is true that later on in the same document it is mentioned that the parties having carried on the entire business aforesaid up to 9-10-1938, closed it and after rendition of joint accounts money was found due to the plaintiffs from Ram Nath. Further it was mentioned that after the death of Pandit Deodutta the share of Ram Nath in the profit and loss account at four annas per rupee was fixed. Deodutta died on 29-3-1937, and learned counsel for the respondent has urged that according to this statement the share in the profit and loss was not settled till after 29-3-1937. Ram Nath is the principal witness for the plaintiff to prove this partnership and the lower Court has relied on his evidence, but the learned counsel for the respondent has rightly pointed out that we cannot place any reliance on the evidence of Ram Nath as he was an interested witness. It is admitted on behalf of the plaintiffs that there was a registered firm in Raj Darwaza, Benares, carrying on business under the name of Deodutta Baldeo Parsad of which Deodutta Baldeo Parsad as representing the plaintiffs' family and Ram Nath were partners. That was a registered firm. The defendant's case is that that firm had opened branches in various places and one of those places was Sheopur and that the plaintiffs' allegations that Deodutta Baldeo Prasad at Sheopur was a different firm of which the partners were different from the firm



of the same name at Raja Darwaza is false. The defendant has drawn our attention to the fact that under the agreement entered into between the plaintiffs and Ram Nath, Ram Nath was not being made at all liable for the loss, if any, of the Sheopur firm and that in case the suit was decided in favour of the plaintiffs against Phusi Ram, Ram Nath was to gain a sum of Rs. 1000. Ram Nath is thus an interested witness and learned counsel has argued that his evidence was wrongly accepted by the Court below. The figures given in this agreement bear out the suggestions made by learned counsel for the respondent. The total amount due from Ram Nath, according to the figures given in this agreement, was Rs. 16,053-1-6 out of which the amount due to the plaintiffs from Ram Nath for the Sheopur firm was over Rs. 5000. The plaintiffs gave up about Rs. 5000 and agreed to take Rs. 11,000 from Ram Nath by eleven annual instalments of Rs. 1000 without any interest and it was provided in para. 4 of this agreement that if Ram Nath helped the plaintiffs in recovering the money due to them by other partners, the plaintiffs would remit a sum of Rs. 1000 out of this Rs. 11,000. That, it is suggested, was the price paid for his evidence.

[9a] It is further pointed out that though the partnership was alleged to have been dissolved as far back as 9-10-1938, and defendant 2, Raj Narain Singh, filed his written statement on 28-5-1941, denying all liability, no claim has yet been made against him. The suggestion on behalf of Phusi Ram by his counsel is that the plaintiffs and the other defendants have conspired together against his client to make him a scape-goat for the loss of the business carried on by the plaintiffs.

[10] Learned counsel for the respondent has drawn our attention to a decree in Suit No. 79 of 1936 where the firm, Deodutta Baldeo Prasad, filed a suit against the firm Madan Gopal Krishna Kumar and in the plaint it was mentioned that the firm had its head-office in mohalla Raj Darwaza and its branch office at Sheopur. The suit was filed through Deodutta Baldeo Prasad and Ram Nath who were said to be the only partners of the firm. The explanation given by Ram Nath is that when he went to consult his lawyers to institute a suit on behalf of the Sheopur firm he was told that there would be difficulty as the firm was not registered and he was advised to file a suit in the name of the Raja Darwaza firm treating the Sheopur firm as the branch thereof so that the plea that the firm was unregistered might not be available to the defendant. This is a plausible explanation and has been accepted by the Court below, but we find that the suit was instituted

on 18th October 1936, and if the difficulty of instituting suits was pointed out to the partners as early as that date there is no explanation why the partnership was not registered, though it existed for about two years after 1936.

[11] A firm Radha Kishun Sheo Dat who were entitled to get some money from Deodat Baldeo Prasad, Sheopur, filed a suit in which they impleaded Phusi Ram as a defendant. Phusi Ram filed a written statement on 25th September 1940, in which he alleged that he was not a partner in the Sheopur branch; on the other hand, he worked in it as a working partner and was entitled to a four annas share in the profits in lieu of service and was not liable for its loss. The other defendants did not contest the suit and on 3rd October 1941, the Court decided in favour of Phusi Ram and Rajjan Singh and decreed the suit against Vidhyadhar and Ram Nath alone. It is, however, pointed out to us that that judgment is still under appeal and the case has not been finally decided.

[12] As against all this, learned counsel for the plaintiffs has relied on a statement made by Phusi Ram in this case and on several previous statements made by him and has argued that it must be held on the admissions made by the defendant that the defendant's share of liability was four annas in the rupee and that the partnership commenced on 29th September 1936, and continued up to 9th October 1938. The first statement of Phusi Ram relied on on behalf of the plaintiffs is dated 28th October 1937, in which he said that he was a working partner in the firm Deodutta Baldeo Prasad but that his share had not yet been settled or specified. That is not a very clear statement, and we do not think much reliance can be placed on it. The next is an income-tax return submitted on 3rd December 1938. It is signed by Phusi Ram and his name is given as one of the partners and his share is mentioned as four annas, but the name of the business is given as Ganga Flour Mill, Raja Darwaza, Benares, though in the heading the name is mentioned as Deodatt Baldeo Prasad but the status is given as "Ganga Flour Mill" Nobody has come forward to explain what "Ganga Flour Mill" means and what connection it had with this firm at Sheopur. We do not think we can place much reliance on this return either. In a criminal case Phusi Ram made a statement on 4th August 1941, in which he said that he was a partner in the firm Deodutta Baldeo Prasad and that he had a four anna share in the profits. Besides this statement, the statement of Phusi Ram in this case and his conduct is such that we have no doubt that he was a partner in the Sheopur firm.

[13] We have already mentioned that Phusi



Ram did not claim that he was to get a minimum salary of Rs 2000 a year till he gave his evidence on 2nd October 1942. In the written statement, all that he had said was that he was to get a one-fourth share in the profits as his remuneration. He admitted in evidence that there was a separate *naukrana khata* in which the names of all the servants were mentioned but his name or that of Raj Narain did not find a place in that *Khata*. He further admitted that in the income-tax returns the amount paid to him was never shown as remuneration paid to an employee. He admitted that there was loss in the first year and there was profit in the second year and he got one-fourth share of the balance as his remuneration which clearly means that he was made liable for one-fourth of the loss for the first year. He has explained that his statement before the Income-tax Officer that he was a partner in the plaintiffs' firm and his signature on various cheques as proprietor were all in accordance with the directions given by the real proprietors. He admitted that he had taken out a sum of Rs. 6756-5-0 from the firm out of which, he said, he was entitled to deduct Rs. 6000 towards his salary. We cannot accept his statement, which is a very belated one, that he was entitled to get Rs. 2000 a year as salary. It is unlikely that a person who was merely a servant in the firm and was not one of its proprietors would be allowed to withdraw a sum of over Rs. 6000 without any protest on behalf of the proprietors. We, therefore, feel satisfied that Phusi Ram was a partner of the firm and his share in the loss and profits of the business was four annas in the rupee. He has admitted that the partnership business commenced on 15th April 1935, and continued up to 9th October 1938.

[14] The next question that we have to consider is whether the suit is maintainable or is barred by S. 69, Partnership Act. Section 69 came into force on 1st October 1933, one year after the commencement of the Act and though the Act does not in so many words make registration of firms compulsory nor does it impose penalties such as are imposed under the English law by the Registration of Business Names Act, yet the effect of the rules in this section were intended to necessitate the registration of a firm at one time or the other. With this object in view the section provides that no suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a

partner in the firm. This sub-section, which is sub-s. (1) of S. 69, relates to a suit by a partner against the firm or against another partner. The second sub-section relates to a suit against third parties by or on behalf of a firm and provides that no suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm. These two sub-sections were intended to be wide enough to include all possible suits relating to partnership where the claim was against a partner or against a third party. There are, however, certain important exceptions in the next sub-section and we are only concerned in this case with sub-s. (3), cl. (a) which is in these terms :

"The provisions of sub-ss. (1) and (2) shall apply also to a claim of set off or other proceeding to enforce a right arising from a contract, but shall not affect —

(a) The enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm."

[15] In the case before us, the firm was dissolved on 9th October 1938, long before the suit was filed. All that we have, therefore, to see is whether it is a suit "for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm." At one time the opinion in this Court was that a suit for accounts under this sub-section was a suit for a relief of a limited nature and it was held that "the prayer for taking the partnership account could be granted only in the limited terms of S. 48 of the Act" and the words "realise the property" in S. 69 (3) (a) of the Act did not cover the question of taking accounts from a partner to be followed by a final decree directing the partner to pay the sum so ascertained : see 1939 A. L. J. 405.<sup>1</sup> This view was, however, soon dissented from and the case was overruled by the decision in 1939 A.L.J. 964.<sup>2</sup> It was held in that case that the rights of a partner of an unregistered firm to a decree for accounts in a suit for dissolution remained unaffected by the provisions of S. 69, Partnership Act, in view of the proviso contained in sub-s. (3) thereof.

[16] Learned counsel for the respondent has supported the decision of the Court below on the ground that this was not a suit for dissolution of a firm as the plaintiffs' allegations were that the firm had already been dissolved. He has further contended that it is not a suit for accounts of a dissolved firm as the plaintiffs have claimed specific sums of money from defendant 1 alone. Lastly, he has urged that it is not a suit to realise the property of a dissolved firm as that, according to him, contemplates a suit



against a third party and not against a partner. Learned counsel wants us to read sub-s. (3) of S. 69 in the way that a suit for the dissolution of a firm or for accounts of a dissolved firm is an exception to sub s. (1) and is a suit that can be filed against a partner while a suit to realise the property of a dissolved firm is an exception to sub-s. (2) and can be filed only against a third party. He has relied on certain observations by Beaumont C. J. in I. L. R. (1938) Bom. 102.<sup>3</sup> where the learned Chief Justice has observed that "the two parts of sub-cl. (a) of sub s. (3) must be read as referring respectively to the first two sub-sections" and has gone on to say :

"As I have pointed out, the first sub section deals with the right to enforce a contract by one partner against the others, and sub-s. (2) deals with the right to enforce a contract by the firm against third parties."

To our mind, learned counsel has misunderstood the judgment of Beaumont C. J. In an earlier part of the judgment, his Lordship has mentioned that sub s. (3) introduces certain exceptions to the disabilities imposed by the first two sub-sections. And as we read the judgment, it does not appear to us that it means that a suit to realise specific sums of money due to the firm from a partner of a dissolved partnership is not maintainable. From the report, it is not clear whether the claim in that case was against a partner or against a third party. If the claim was against a partner, then the decision is against the respondent as the suit was decreed; but if it was a claim against a third party, then the observations are merely obiter. To our mind, the exception in sub-s. (3) is wide enough to include a claim for money due to a dissolved firm either by a partner or by a third party.

[17] Learned counsel has then drawn our attention to the observations in the overruled decision in 1939 A. L. J. 405<sup>1</sup> referred to above that the words "realise the property" mean turning the property into money by sale and do not cover the question of taking accounts from a partner to be followed by a final decree directing the partner to pay the sums so ascertained. According to learned counsel the meaning of the words "realise the property" as given in this case has not been overruled by the Full Bench. We do not think, however, that the interpretation put by learned counsel on the decision of the Full Bench of this Court is correct and, to our mind, the words "any right or power to realise the property of a dissolved firm" would include the right to recover it from a third party or from a partner from whom the property may be recoverable and the word "property" must be interpreted to include a claim for money. To put any other interpretation on this sub-section would raise this anomaly

that, while a partner may sue another partner of a dissolved partnership for accounts which would result in a decree in his favour for such sum as may be due from the defendant, if they go into the accounts out of Court and it is found that a certain sum of money is due to the partnership from one of the partners, no suit for the recovery of that amount would lie and the plaintiff would have to claim accounts afresh. It being admitted, therefore, that the partnership was dissolved before the date of the suit and, it being the plaintiffs' case that the sums claimed by the plaintiffs were due from the defendant, Phusi Ram, to the partnership, the suit to our mind, was clearly maintainable. We need hardly mention a point which has now been well settled that S. 69, sub-ss. (1) and (2) relate not only to an unregistered firm which is in existence but also to a firm which has been dissolved and bar all suits by or on behalf of a firm or by or on behalf of a partner in an unregistered firm unless they come within one of the exceptions mentioned in sub s. (3). We have, therefore, to see whether the case comes under one of the exceptions and, to our mind, it clearly does.

[18] Out of the three amounts claimed by the plaintiffs, the claim for Rs. 650 cannot come under the bar of S. 69 on the allegations made by the plaintiffs in their plaint. They alleged that the trade mark was the private property of the plaintiffs and it was rented out to Phusi Ram after the dissolution of the partnership on a rent of two annas per bale. Learned counsel for the parties are agreed that if the allegations in the plaint are true, the claim for the sum of Rs. 650 is not barred by S. 69, Partnership Act. Learned counsel for the respondent has, however, strenuously argued that the allegations in the plaint are not true, and we shall deal with this point when we deal with the specific items which have been claimed by the plaintiffs. Of the other two items claimed, Rs. 6756 50 was the amount which Phusi Ram had admittedly overdrawn from the partnership assets and Rs. 1341-14-3 was alleged to be Phusi Ram's share of the loss incurred by the partnership. The question is whether the suit by a partner of a dissolved firm to realise these two items can be called a suit to realise the property of a dissolved firm, and we have already said that, to our minds, it is a suit of that nature.

[19] Learned counsel for the respondent has relied on the case in I. L. R. (1937) Bom. 628,<sup>4</sup> a decision of Beaumont C. J. In that case there was a firm carrying on business in the name of the Union Trading Agency. The accounts were made up and the estimated amount of income-tax payable by the firm was taken to be a sum



of Rs. 600. Later on, however, the assessment was for Rs. 3400 odd. The plaintiff paid the whole amount and claimed contribution giving credit for the sum of Rs. 600 and odd already paid by the defendant. In that case it was held that the suit was not to realise the property of a dissolved firm and was therefore not maintainable. The main decision turned on the question whether sub-ss. (1) and (2) of S. 69 applied to an existing firm or also to a dissolved firm and his Lordship pointed out that it was not essential that the firm should be actually in existence at the date when the suit was instituted to apply the bar of sub-ss. (1) and (2) of S. 69. We may, with great respect, point out that in one view of the matter it might have been construed as a suit for realisation of the property of a dissolved firm inasmuch as if the true amount of income-tax payable were known at the time of dissolution and accounting between the parties, the assets of the firm would have had to be deducted by a sum of Rs. 3400 and it was only the balance that would have been available for division between the partners. However that may be, the facts of that case are entirely different from the facts of this case, and that decision was explained by Beaumont C. J., himself in I.L.R. (1938) Bom. 102,<sup>3</sup> and the decision of the later case supports our view that a suit to recover a debt due to a firm by partners, who were members of the firm at the date of dissolution, is a suit to enforce the right to realise the property of a dissolved firm and is maintainable.

[20] We may, however, mention that for the reasons to be given by us later we have come to the conclusion that the accounts of the partnership were never settled between the parties and though the plaintiffs have claimed specific sums of money we think that the proper relief which should have been claimed by the plaintiffs was a relief for accounts. In the present case where the plaintiffs have claimed specific sums of money on the allegation—though we might mention that the plaintiffs do not specifically say that there was ever any settlement of account—that the accounts were gone into and the sums were found due to the plaintiffs, we may pass a decree for accounts if we are not satisfied that there was a proper settlement thereof and it does not seem to be necessary that we should either direct the plaintiffs to withdraw the suit or dismiss it on the ground that the relief claimed was not the proper relief.

[21] The allegations as regards the settlement of accounts are in these words in the plaint, para. 6 :

"An account was prepared up to that date (9th of

October, 1938) and the entire *jama kharch* entries were made in the account book of the partnership firm aforesaid and it was found that there was a loss of Rs. 5939-0-9 up to 9-10-1938."

Ram Nath, one of the partners, who was the principal witness for the plaintiffs stated :

"Accounts were settled on that date and the balance sheet was prepared. Exhibit 17 is the balance sheet of the firm."

His cross-examination, however, clearly showed that there were various articles belonging to the partnership which were not taken into account at the time of dissolution. He stated that the trade mark had been paid out of the firms' money. We may mention that learned counsel for the appellant, Mr. Mushtaq Ahmad, made a clear statement on instructions obtained by him in our presence that it was his clients' case that the trade mark was the property of the firm. We want to mention it here as it goes against the allegations in the plaint as we read the same. It does not appear how this trade mark was disposed of. Mr. Mushtaq Ahmad suggested that the trade mark was transferred to the plaintiffs for the same price for which it had been purchased, but we can find no evidence to that effect. If this trade mark was the property of the firm and it was used by one of the partners after its dissolution anything that he may have to pay under this head would be payable to the partnership and not to the plaintiffs. In the account that has to be gone into by the Court below this aspect of the claim would have to be considered in deciding whether the plaintiffs are entitled to anything for the use of the trade mark by Phusi Ram and, if so, how much. Phusi Ram's case is that he used the trade mark free of charge, whereas the plaintiffs allege that he had to pay two annas per bale as hire. We wish to express no final opinion on this point of the hire as we consider that it would be proper that the point should be left to the decision of the lower Court after it goes through the accounts either itself or through a Commissioner. The lower Court held that the sum of Rs. 650 was recoverable by the plaintiffs but it had found a few sentences earlier that the trade marks were the property of the Sheopur partnership as they were bought out of the money belonging to the Sheopur firm. If that were so, we do not see how the plaintiffs were held to be entitled to claim the whole of the sum of Rs. 650. We, therefore, consider that it would be more satisfactory if this point is considered by the Court below at the time of the settlement of accounts.

[22] Coming back to the question of settlement of accounts, Baldeo Prasad, one of the plaintiffs, said that Ex. 17 was the final balance sheet prepared after due accounting in respect of that firm. In his cross-examination he showed



complete ignorance as to what happened to the stock of the dissolved firm and admitted that he did not know the value of the stock at the time of dissolution. He went on to say that the balance sheet was prepared in his presence. His father was also present but the plaintiff did not check the balance sheet. There is no other evidence on the point. A glance, however, at Ex. 17, the so-called balance sheet, would show that it is not a settlement of accounts nor does it purport to be such. It is called in Hindi a *talpat* from Asauj Sudi 10, Sambat 1994, which would be some date in September-October 1937, to 8-10-1938. A settlement of account to be complete would have to be from the beginning of the partnership right up to the end. Further, Ex. 17 appears to be merely a total of the debits and credits of the various ledger heads. On the debit side is shown a suspense account of Rs. 73-10-9 and on credit and debit sides are various ledger heads giving the amounts due to and from various persons and then they have been totalled up. The sum of Rs. 5939-0-9 which the plaintiffs claim was the loss incurred by the partnership as a result of the working for the several years is itself shown as one of the items on the debit side. Whatever may be said about the line of defence taken by Phusi Ram, we find from his evidence in Court that he has been rather frank and has admitted many things which now go against him. According to him, Ex. 17 is the balance sheet of the credits and debits of the partnership and we are inclined to accept his statement. To our mind, the accounts of the partnership were never settled, in accordance with the mode of settlement of accounts given in S. 48, Partnership Act. It will, therefore, be necessary for us to send this case back to the lower Court for the settlement of accounts and then for a decision as to how much was due from Phusi Ram to the plaintiffs. If nothing was due, the plaintiffs' suit must fail.

[23] Learned counsel has argued that his clients invested the entire capital needed by the partnership and as the defendant has admitted that he had overdrawn to the extent of rupees 6756-5-0 his clients should get a decree at least for that sum. We, however, cannot treat that sum as a separate claim and it must be taken into account in settling the accounts of the partnership in accordance with the provisions of S. 48, Partnership Act.

[24] The result, therefore, is that this appeal is allowed, the decree of the lower Court is set aside and the case is sent back to that Court for settlement of accounts and preparation of a decree in accordance with the provisions of S. 48, Partnership Act. As regards costs, the plaintiffs are not entitled to any costs. Their suit in its

form was defective and we are showing them an indulgence by giving them decree for accounts when they came into Court on false allegations and claimed only specific sums of money. Their conduct in trying to saddle the responsibility on Phusi Ram alone is also not commendable. In this Court they had first engaged Mr. Harnandan Prasad as counsel but eventually took away the papers from him under a trick and never paid him his fees nor did they send any reply to his letters or allow him to withdraw from the case. Under the circumstances we think we should make them pay their own costs in both the Courts. The defendant will bear his own costs.

G.N.

*Case remanded.*

**A. I. R. (34) 1947 Allahabad 235 [C. N. 100.]**  
SINHA J.

*Emperor v. Lachmi Narain*

Criminal Misc. Nos. 533 and 313 of 1946, Decided on 3-7-1946.

Penal Code (1860), S. 191 — Person swearing affidavit—Paragraphs thereof certified on personal knowledge and belief without specification — He can contend that mischievous paragraphs are based on belief — Allegation in affidavit same as that made by accused in application to trial Court — Allegation not true — Still it affords good ground for such person to entertain belief that it was true.

Where a person swears an affidavit all the paragraphs of which he certifies on his 'personal knowledge and beliefs but there is no specification as to which of the paragraphs are based on personal knowledge and which on belief, it is open to him to contend that the mischievous paragraphs are based, not on his personal knowledge, but on belief. [Para 4]

Where an accused person makes an application before the trial Court in which he makes precisely the same allegation which a person subsequently makes in an affidavit which he swears in support of an application for transfer of the case, although the allegation in the application presented by the accused may not be a true allegation or a slight inquiry may demonstrate that it was untrue, yet it affords a good ground for such person to entertain 'a belief that it was true'; ('33) 20 A. I. R. 1933 P. C. 124, *Foll.* [Paras 4 & 7]

*Case referred:—*

1. ('33) 20 A. I. R. 1933 P. C. 124 : 32 S. L. R. 716 : 142 I. C. 335 : 1933 A. L. J. 645 (P.C.), *Dwarka Nath Verma v. Emperor.*

*Government Advocate — for the Crown.*

*P. C. Chaturvedi and Muhammad Jalaluddin Ahmad — for Opposite Party.*

**Order.** — An application was presented by Mr. P. C. Chaturvedi, a learned counsel of this Court, on behalf of Sita Ram Tandon for the transfer of the criminal case: *King-Emperor v. Sita Ram Tandon*, of 1945, pending before Mr. Bhanu Prakash Elhence, Assistant Sessions Judge of Moradabad to some other Court.

[2] It appears that Sita Ram Tandon was charged with various offences under Ss. 417, 466



and 409/379, Penal Code, that is for cheating, forgery, criminal breach of trust and theft. This trial was started on 23-3-1946. It appears that one Sundersan Iyer was examined as a witness, and, according to the affidavit sworn by Lachmi Narain, a relation and *Parrokar* of the accused, the learned Judge expressed an opinion as regards certain documents that they had been forged by the accused. It was also observed that the accused was guilty of interpolations.

[3] The application for transfer was presented before Malik J. who issued notice and stayed the proceedings. A copy of the affidavit was, as usual, sent to the learned Assistant Sessions Judge for such explanation as he deemed proper to submit. The learned Judge denied the remarks attributed to him. The matter came before Mulla J. on 16-5-1946. The application for transfer was, in view of the explanation, very properly not pressed by Mr. Chaturvedi. The learned Judge, however, thought that the interests of justice demanded that serious notice should be taken of the conduct of Lachmi Narain. Notice was, therefore, sent to him to show cause why he should not be prosecuted for an offence of perjury. In answer to this notice Lachmi Narain appears before me.

[4] I have heard him and have also heard at length his learned counsel, Mr. Jalaluddin Ahmad, and have come to the conclusion that no useful purpose will be served by taking any proceedings against him. He appears to me a simple man, unaware of the intricacies of the proceedings in a Court of law. It is true that he has sworn an affidavit all the paragraphs of which he has certified on his personal knowledge and belief," but there is no specification as to which of the paragraphs are based on personal knowledge and which on belief. In this state of things it is open to him to contend that the mischievous paragraphs are based, not on his personal knowledge, but on belief, and there was good ground for this belief because Sita Kam Tandon himself had, on 25-3-1946 made an application before the learned Assistant Sessions Judge in which he had made precisely the same allegation which Lachmi Narain made in the affidavit, which he swore in support of the application presented to this Court.

[5] The learned Crown counsel contends that Lachmi Narain was bound 'to state the truth', but if he made a statement which is false, and which he either knows or believes to be false or does not believe to be true he is clearly guilty of an offence within the meaning of S. 191, Penal Code.

[6] As their Lordships of the Judicial Committee in the well known case in 1933 A. L. J. 645<sup>1</sup> at p. 659 say :

"It should be unnecessary to point out that a man may make a statement in the belief that it is true though good reasons exist for knowing it to be false, for, unfortunately, man's beliefs are not always influenced by good reasons."

[7] The allegation in the application presented by Sita Ram Tandon on 25-3-1946, may not be a true allegation or a slight inquiry might have demonstrated that it was untrue; nevertheless, it afforded good ground for Lachmi Narain to entertain 'a belief that it was true'.

[8] I am, therefore, of opinion that the learned Crown counsel has failed to convince me that Lachmi Narain made a deliberately false statement when he swore the affidavit in support of the application for transfer of the case from the Court of Mr. Elhence, the learned Assistant Sessions Judge.

[9] I, therefore, direct the notice to be discharged.

V.R./D.H.

Notice discharged.

### A. I. R. (34) 1947 Allahabad 236 [C. N. 101.]

WALI ULLAH AND PATHAK JJ.

*A. H. Wheeler & Co.—Applicant v. Commr. of Income tax, U. P. and C. P. and Berar Lucknow—Opposite Party*

Misc. Case No. 25 of 1944, Decided on 7-5-1946, reference made by Income-tax Appellate Tribunal.

Excess Profits Tax Act (1940), S. 8 (2) — Assessee exercising option that business be deemed not to have been discontinued, cannot withdraw it at appellate stage, even with consent of Excess Profits Tax Officer — Evidence Act (1872), S. 115.

Where an assessee has once exercised his option under S. 8 (2), (*viz* that the business be deemed not to have been discontinued, in spite of the death or retirement of one of the partners) before the prescribed date and the option so exercised is accepted by the Excess Profits Tax Officer and the assessment made on the basis thereof (in respect of a chargeable accounting period), the assessee is not entitled to withdraw the option so exercised later on at the appellate stage with a view to claim that the business be deemed to have been newly commenced: *Case law reviewed*.

[Paras 1, 10 and 12]

Election once exercised cannot be withdrawn after the assessment even with the consent of the Excess Profits Tax Officer. The Crown would not be bound by an act of its officer who acts in a manner opposed to the terms of the statute: (1933) 17 Tax Cas. 432, *Rel. on*.

[Para 10]

#### Cases referred:—

1. (1882) 7 A.C. 345 : 51 L. J. Q. B. 612 : 47 L. T. 258 : 30 W.R. 893, Benjamin Scarf v. Alfred George Jardine.
2. (1 Sm. L. C. 8th Edn. 47) Dimpore's Case.
3. (1897) 1897 A. C. 286 : 66 L.J.P. 86 : 76 L.T. 579 : 45 W. R. 667, Cory Brothers & Co. Ltd. v. Owners of the Turkish Steamship "Mecca".
4. ('36) 58 All. 791 : 24 A. I. R. 1937 All. 1 : 166 I. C. 423 (F. B.), Gajram Singh v. Kalyan Mal.
5. (1903) 1 K. B. 715 : 74 L. J. K. B. 413 : 92 L. T. 519, Seymour v. Pickett.
6. ('33) 60 Cal. 1265 : 21 A. I. R. 1934 Cal. 40 : 149 I. C. 262, Kunjamohan Shaha v. Karuna Kanta.
7. ('40) I. L. R. 1940 Lah. 470 : 27 A. I. R. 1940 P. C. 63 : I. L. R. 1940 Kar. P. C. 134 : 67 I. A. 160 : 187 I. C. 233 (P. C.), Rama Shaha v. Lal Chand.



8. (1907) 6 C. L. J. 547, Bai Kunta Nath v. Salimulla Bahadur.  
 9. (1933) 55 All. 735 : 20 A. I. R. 1933 All. 579 : 147 I. C. 932, Mangat Rai v. Dulichand.  
 10. (1933) 17 Tax. Cas. 432, Trustees of the Will of H. K. Brodie v. Commr. of Inland Revenue.

*P. L. Banerji and R. C. Ghatak*—for Applicant.  
*Brijlal Gupta*—for Opposite Party.

**Pathak J.**—This is a reference made by the Income-tax Appellate Tribunal under S. 66 (1), Income-Tax Act read with S. 21, Excess Profits Tax Act. The questions referred for the decision of this Court by this reference are as follows:

"(1) Whether the assessee having once exercised his option under S. 8 (2), Excess Profits Tax Act (*viz.* that the business be deemed not to have been discontinued) before the prescribed date and the option so exercised having been accepted by the Excess Profits Tax Officer and the assessment made on the basis thereof (in respect of a chargeable accounting period), the assessee is entitled to withdraw the above option later on at the appellate stage with a view to claim that the business be deemed to have been newly commenced?"

(2) If the answer to question (1) above be in the affirmative, whether in the present case the previous year '1938' determined for the assessment of 1939-40 can by itself be selected as a standard period by the assessee under sub-cl. (d) of S. 6 (2), read with the proviso thereto, there having been no (and could not have been any) assessment for 1938-39 for a business deemed to have been newly started on 1-1-1938 and having the calendar year as its previous year and consequently no previous year determined for that assessment?"

[2] The assessee is the firm of Messrs. A. H. Wheeler & Co. The chargeable accounting periods in respect of which this firm has been assessed to Excess Profits Tax are two: (1) 1-9-1939 to 31-12-1939 and (2) 1-1-1940 to 31-12-1940. In October, 1940 a notice under S. 13, Excess Profits Tax Act was issued to the assessee calling upon him to furnish a return with respect to the first of the chargeable accounting periods mentioned above. By letter, dated 6-11-1940, the assessee while asking for an extension of the date for the delivery of the return, purported to exercise the discretion conferred upon it by S. 8, in consequence of the change having taken place in the persons carrying on the business as a result of the death of one of the partners, and the assessee gave intimation to the Excess Profits Tax Officer in the following terms:

"Further a change in the constitution of the firm took place with effect from 1-1-1938 on account of the death of the then senior partner, Mr. E. E. Morgan, but we should like you to treat this business as not having been discontinued for the purposes of computation of standard profits".

[3] That officer informed the assessee by letter, dated 22-11-1940, that the election made in the assessee's letter was approved. In the month of May 1941, a notice under S. 13, Excess Profits Tax Act was issued in respect of the second of the two above-mentioned chargeable accounting periods. It appears that the returns

were filed by the assessee in respect of both the chargeable accounting periods in due course. Having elected to treat the business as continuing—despite the death of one of the partners—the assessee-firm proceeded to exercise the option conferred upon it by S. 6 (2), in the matter of the selection of the standard periods and asked for the fixation of the standard periods in accordance with cl. (d) of sub-S. (2), of S. 6 for the purpose of determining the standard profits of the business in relation to both the above-mentioned chargeable accounting periods. The result was that on 30-6-1942, the assessment to Excess Profits Tax was made in respect of both the chargeable accounting periods on the footing that there was no discontinuance of business. Pursuant to the assessment, notices of demand were served upon the firm on 3-7-1942. One day before the service of the notice, namely, on 2-7-1942, the firm addressed a letter to the Excess Profits Tax Officer stating:

"We have just discovered that it will probably be more advantageous for us to select a slightly different standard period; but we ourselves are rather confused on the point as the Excess Profits Tax Act is beyond our understanding. We shall, therefore, feel grateful if you will kindly fix a date on which one of our partners as also our Accountant can see your goodself and discuss the matter".

The Excess Profits Tax Officer having completed the assessment prior to the receipt of this letter had become *functus officio* and could not take any action on it, but in the two appeals which had been preferred by the assessee from the two assessment orders, the assessee firm took up the position that it should be treated as a new firm which commenced its business on 1-1-1938 and the standard period applicable to it was the period from 1-1-1938, to 31-12-1938, which was the "previous year" as determined under S. 2, Income tax Act for the purpose of the income-tax assessment for the year ending 31-3-1940. In taking up this position, the assessee firm withdrew the option which had been exercised by it in the course of the assessments made by the Excess Profits Tax Officer, and taking advantage of S. 8 (1), Excess Profits Tax Act selected the standard period provided by cl. (d) of sub-s. 2 of S. 6 of that Act. It appears that the Income-tax Department was represented by the Excess Profits Tax Officer before the Appellate Assistant Commissioner of Excess Profits Tax. The Appellate Assistant Commissioner remarked: "The Department takes no exception to the appellant's withdrawing his application under S. 8 (2) at this stage if the option claimed is otherwise found available to the appellant." The result was that the assessee-firm having resiled from the election made by it before the Excess Profits Tax Officer and the withdrawal of the election having been



accepted by that officer, the Appellate Assistant Commissioner proceeded to decide the appeals before him upon the footing that no election had been made by the assessee in terms of S. 8 (2), Excess Profits Tax Act. The Appellate Assistant Commissioner took the view that the assessee was not entitled to take the benefit of cl. (d) of sub-s. 2 of S. 6 inasmuch as no business having been carried on by the assessee prior to 1-1-1938, there could be no "previous year" determinable under S. 2, Income-tax Act for the purpose of the income-tax assessment for the year ending 31-3-1939 and the "previous year" determined for the year ending 31-3-1940 could not alone attract the application of cl. (d) of sub-s. 2 of S. 6. In the result, the Appellate Assistant Commissioner dismissed the appeals of the assessee and confirmed the assessment made by the Excess Profits Tax Officer in respect of both the above-mentioned chargeable accounting periods. Against the orders of the Appellate Assistant Commissioner, the assessee appealed to the Income-tax Appellate Tribunal. The Tribunal upheld the orders of assessment with a modification with which this reference is not concerned. In doing so, it rested its decision not only upon the ground taken by the Appellate Assistant Commissioner regarding the non-applicability of cl. (d) of sub-s. 2 of S. 6 in a case where the "previous year" is available only for one of the two assessment years mentioned in that clause, but also took the additional ground that the Income-tax Department did not possess the

"legal right to concede that the appellant (assessee) could withdraw the notice given in writing under S. 8 (2) . . ."

and, that in any event, such a withdrawal could not be made after the return had been delivered and assessment made.

[4] Thereupon the assessee made applications under S. 66 (1), Income-tax Act, read with S. 21, Excess Profits Tax Act, to the Income-tax Appellate Tribunal to refer questions of law arising out of its orders with the result that the Tribunal submitted a statement of the case and referred the questions mentioned above for decision to this Court.

[5] With regard to the first question, it has been submitted on behalf of the Commissioner of Income-tax that election once exercised and intimated to the Excess Profits Tax Officer cannot be varied at a later stage of the assessment, much less in appeal after the assessment is complete; while the contention on behalf of the assessee is that it is open to the assessee to withdraw the election and to vary the option, particularly when the Crown is not adversely affected by the withdrawal. It must be observed that the statute contains no provision for the

withdrawal of the election. Options have been given to persons both under statutes relating to taxation as well as under other statutes; and sometimes a careful provision is made by the statute itself, whereby it is intended to confer the right of varying the option upon the person to whom such option was given. In the Income-tax Act, for example, under S. 2 (11) an option is given to the assessee to choose the "previous year" in the manner laid down therein. But a power is also given to the assessee to vary the option after he has once exercised it but with the consent of the Income-tax Officer and upon such conditions as that Officer may think fit. The absence of a similar provision in the Excess Profits Tax Act leads to the inference that it was not in the contemplation of the Legislature to give the power to the assessee to vary the option after it has once been exercised.

[6] It is obvious that where an assessee elects to treat his business as continuing after a change in the persons carrying on such business owing to the death or retirement of a partner, certain legal consequences flow from the exercise of such election. The machinery of the Excess Profits Tax Act has to be set in motion in a particular manner and the proceedings in relation to assessment have to be carried on by the Excess Profits Tax Officer upon the footing that there was no discontinuance in the business and no commencement of a new business upon the death or retirement of a partner. It is manifest, therefore, that an option, once exercised but later varied, would lead to inconvenient results. All the proceedings taken by the Excess Profits Tax Officer upto the stage of the reversal of the option would have to be set aside and the assessment would have to be re-started from the stage when the election was made in accordance with S. 8 (2), Excess Profits Tax Act.

[7] It should be borne in mind that there is a time-limit prescribed for the exercise of this option, and the election has to be communicated to the Excess Profits Tax Officer in a formal manner by notice given to him in writing before the prescribed date. And if power to vary the election is conceded to the assessee, what would be the limit to the exercise of that power? Could election be made and withdrawn any number of times? These considerations lead to the conclusion that the election once made is absolute and is not subject to variance thereafter at the sweet-will of the assessee. This result is in consonance with the general principles governing cases where the power of election is accorded to an individual by the law. These general principles have been thus stated by Lord Blackburn in (1882) 7 A. C. 345<sup>1</sup> :



"Now on the question there are a great many cases; they are collected in the notes to 1 Sm. L. C. 8th Edn. 47,<sup>2</sup> at p. 54, and they are uniform in this respect, that where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered. "*Quod semel placuit in electionibus, amplius displicere non potest.*" That is Coke upon Littleton (146a), and I do not doubt that there are many older authorities to the same effect; but that rule has been uniformly acted upon from that time at least down to the present. When once there has been an election to do one of the two things you cannot retract it and do the other thing; the election once made is finally made."

The question of the right to vary the option also arose before the House of Lords in 1897 A. C. 286<sup>3</sup> in relation to the right of the creditor to make appropriation of payments made by the debtor. In that case, the effect of the communication of the appropriation made by the creditor was also considered. At p. 292, Lord Herschell is reported to have remarked:

"The question to be determined is what was the effect of the transmission to the respondents of the statement of account of 22nd August. It is clear that if the appellants had merely entered in their own books an account such as was transmitted it would not have amounted to any appropriation by them, and they would still have been at liberty to appropriate the payment as they pleased. It is equally clear, however, that when once they had made an appropriation and communicated it to their debtors, they would have no right to appropriate it otherwise."

This was also the view taken by a Full Bench of this Court consisting of Sir Shah Muhammad Sulaiman C. J., Bennet and Iqbal Ahmad JJ. (as they then were) in 58 ALL. 791<sup>4</sup>. The Full Bench observed:

"The creditor's right to make the appropriation would certainly last until he had done something which puts an end to his option. In 1897 A. C. 286<sup>3</sup> at p. 293 Lord Macnaghten laid down that the creditor may exercise his right "until the very last moment". It has been held in some cases that the option may be exercised even during the pendency of the suit. See (1905) 1 K. B. 715<sup>5</sup> and 60 Cal. 1265.<sup>6</sup> But no case has been cited where the option has been allowed as of right after the judgment has been pronounced by the first Court. It seems to us that if the creditor has not chosen to make any appropriation until the Court pronounces its opinion, the provisions of S. 61 come into operation, and it is the duty of the Court to direct the appropriation in accordance with that section. After the decree of the first Court has been passed it would be too late for the creditor to make up his mind to appropriate the payment in a particular way. The appellate Court should as a rule pass the decree which the trial Court would have passed on the date when it decided the case."

In that case it was also observed that:

"The fact that the creditor's counsel offers to make the appropriation in the appeal should not carry any weight."

The answer given by the Full Bench to the question referred to it was:

"The creditor can appropriate the payment to any debt until the judgment is pronounced by the trial Court, but not thereafter."

Their Lordships of the Privy Council set the

seal of their approval on the view taken by the Full Bench in the above case in their decision in I. L. R. (1940) Lah. 470: A. I. R. 1940 P. C. 63.<sup>7</sup> Their Lordships applied the law as laid down by Lord Herschell in 1897 A. C. 286<sup>3</sup> and proceeded:

"There is no obligation upon the creditor to make the appropriation at once though when once he has made an appropriation and communicated it to the debtor, he would have no right to appropriate it otherwise."

Thus, it appears that in the case of appropriation of payments made by a creditor, the limit of time set to such a right is the date of the judgment and, before that event occurs, the right could be exercised at any time, and further the communication of the exercise of the election need not be formal.

[8] In the case of election under S. 8 (2), Excess Profits Tax Act, as has been stated above, communication of the election has to be made in a formal manner by notice in writing and there is a statutory time-limit to the exercise of that power. The present case is, therefore, a *fortiori* and the general principle uniformly adopted by the highest Courts would apply to the present case with greater force. It would seem that after the time prescribed by the statute for the making of the election under S. 8 (2), Excess Profits Tax Act, has expired, there is no option left to the assessee, and it is not open to him to change his mind after the communication of the election made by him to the Excess Profits Tax Officer and after the expiry of the time-limit prescribed by the statute. I cannot better conclude the consideration of this question than by quoting the following observations of Sir Asutosh Mookerjee in 6 C. L. J. 547<sup>8</sup> at p. 556:

"When a litigant has the right to choose between two remedies which are not co-existent but alternative, he may select and adopt one as better adapted than the other, to work out his purpose; but once he has made his choice, and adopted one of the alternative remedies, his act at once operates as a bar as regards the other, and the bar is final and absolute."

It is worthy of note that the case in (1882) 7 A. C. 345<sup>1</sup> mentioned above and this case in 6 C. L. J. 547<sup>8</sup> have been followed by a Bench of this Court consisting of Sir Lal Gopal Mukerji and Young JJ. in 55 ALL. 735: A. I. R. 1933 ALL. 579<sup>9</sup>.

[9] The next question which must be considered now is whether the election once exercised cannot be withdrawn after the assessment, even with the consent of the Excess Profits Tax Officer. The question bristles with difficulties. If 'statutory election'—if I may use that expression—is once made final and conclusive, no amount of consent on the part of an Officer of the Crown, who is bound to act in accor-



dance with the terms of the statute, should be allowed to permit the assessee to re-open the matter. To hold otherwise would lead to the result that such an Officer is entitled to release the assessee from the restriction of the time-limit imposed by the statute for the exercise of the option. Learned counsel for the Department has contended that the Excess Profits Tax Officer is not competent, under the law, to bind the Crown by the statements and declarations for which no power is expressly conferred upon him by the statute. Reliance has been placed by him on the case in (1933) 17 Tax Cas 432.<sup>10</sup> In that case, the assessee sought to found a case of estoppel upon a statement made by the Inspector of taxes contained in a letter addressed by the latter to the assessee that no Income-tax would be claimed in respect of certain sums. The plea of estoppel was repelled by Finlay J., and one of the grounds upon which the learned Judge rested his decision was that it was no part of the duty of the officials of the Inland revenue to make contracts or to make declarations. In the opinion of that learned Judge, it was impossible to hold that the Crown was, in the circumstances, bound by the statements made by those officials.

[10] At the time when an election is made one of the two alternative rights is abandoned, and, having regard to the nature of the act of "election", it is not possible to hold that a right to retract subsists after the act becomes final and conclusive. It should not be open to the party to whom the right of election is given for the exercise of which right a time-limit is imposed, to retract the same after the expiry of the time-limit, as that would nullify the statute. Thus, the Crown would not be bound by an act of its officer who acts in a manner which is opposed to the terms of the statute. I am, therefore, of opinion that the consent of the Excess Profits Tax Officer would not avail the assessee and the election, which was deliberately made, could not be retracted. For these reasons, I would answer the question No. 1 in the negative. In view of the answer given to the first question, the second question becomes immaterial and is only of an academic interest. For this reason I do not consider it necessary that the second question should be answered.

[11] **Wali Ullah J.** — I agree.

[12] **By the Court** — We answer the first question referred to us in the negative and we direct that the assessee will pay the costs of the Income tax Department, which we assess at Rs. 200. Counsel for the Department is given six weeks' time in which to file his certificate. A copy of

this judgment, under the seal of the Court and the signature of the Registrar, will be sent to the Appellate Tribunal

R.G.D.

*Answered accordingly.*

**A.I.R. (34) 1947 Allahabad 240 [C. N. 102.]**

**MALIK J.**

*Faqira and another—Defendants—Appellants v. Jiwan Singh and others—Plaintiffs and Defendants-Respondents.*

Second Appeal No. 1655 of 1943, Decided on 2-10-1945, from decision of Addl. Civil Judge, Bulandshahr, D/- 27-8-1943.

Transfer of Property Act (1882), S. 66 — Permanent lease of mortgaged property by mortgagor — Validity — *N* executing simple mortgage of his proprietary share in village in *A*'s favour and subsequently granting a permanent lease of sir plots in favour of *B* without *A*'s consent — Terms of lease onerous and rendering mortgage security insufficient — *A* obtaining decree for sale on his mortgage against *N* and *B* and purchasing *N*'s share in execution — *N* relinquishing his exproprietary tenancy rights in sir plots to *A* — Lease held not binding on *A* — On determination of exproprietary tenancy by relinquishment *B*'s sub-tenancy came to end and *A* became entitled to possession — T. P. Act, S. 111. [Paras 5 and 8]

T. P. Act—

('45-Com.) S. 65A, N. 1, Pt. 8; S. 111, N. 7, Pt. 14.

*L. N. Gupta* — for Appellants.

*A. Sanyal* — for Respondents.

**Judgment.** — Mt. Nathia was the owner of khata 5 and 6 in village Salarpur in the district of Bulandshahr. Plots Nos 759, 763 and 996 appertained to the said khata and they were the sir plots of Mt. Nathia. On 13-10-1921, Mt. Nathia executed a simple mortgage of her rights and interest in khata 5 and 6 for a sum of Rs. 220 in favour of the plaintiffs. On 10-8-1929, Mt. Nathia executed a permanent lease of the sir plots in favour of Ram Chandra and Faqira, who are the defendants-appellants in this Court. The rent reserved under the lease was Rs. 6 per annum. She gave the lessees the right to make constructions, plant groves and dig wells on the land and agreed that she would compensate the lessees in case they were ejected from the land. The mortgagees filed a suit, No. 315 of 1930, on 15-8-1930, in the Court of the learned Munsif of Bulandshahr on the basis of the mortgage. The lessees, Ram Chandra and Faqira, were also impleaded as subsequent mortgagees and on the allegations that the lease in their favour was collusive and fraudulent and the mortgagor had no right to execute the lease so as to affect the rights of the mortgagees and the mortgagees were not bound by the said lease. The relief claimed was that the defendants might be asked to pay the mortgage money with interest failing which the mortgaged property might be sold.



Neither the mortgagor nor the lessees put in any appearance. The judgment is not on the record, but the preliminary decree has been filed by the plaintiffs-respondents. On 25-10-1930, the learned Munsif passed a decree that the plaintiffs' suit for the recovery of the mortgage money together with interest and costs be decreed *ex parte* and a decree under O. 34, R. 4, Civil P. C., giving six months time for payment be prepared which was accordingly done. The decretal amount not having been paid, a final decree for sale was passed and the property was sold in the year 1932 and was purchased by the mortgagee-decree holders. The sale was for Rs. 300 while the decretal amount was Rs. 885-4-0. The sale was confirmed on 12-10-1932. After the sale Mt. Nathia claimed that she had become the exproprietary tenant of the sir plots Nos. 759, 763 and 996 and was entitled to retain possession on payment of rent. The rent was fixed by the revenue Court at Rs 6-14-0. Mt. Nathia was recorded as the exproprietary tenant till her death. After her death her son, Mamraj, became the exproprietary tenant having inherited her rights, and he relinquished his rights in favour of the plaintiffs on 6-5-1941, for a consideration of Rs. 25.

[2] The plaintiffs filed this suit for possession of the plots on the ground that the lease in favour of the defendants was fictitious and collusive and had been executed on a low rent and the plaintiffs were not bound by the same. It was alleged that the defendants were in possession of the plots without the plaintiffs' consent and they had no right to do so. The plaintiffs, therefore, claimed ejectment of the defendants and claimed damages at the rate of Rs. 20 per mensem. The defence was that Mt. Nathia was the owner of the plots and was entitled to execute the lease. The lease in favour of the defendants was therefore perfectly valid. That the defendants were occupancy tenants of the plots and the plaintiffs had no right to eject them and the civil Court had no jurisdiction to entertain the suit.

[3] The learned Munsif framed six issues, only two of which it is now necessary to consider. Issues 3 and 4 were :

"3. Whether the patta in favour of the defendants is void and inoperative against the plaintiffs for reasons alleged in Para. 3 of the plaint ?

4. Whether the plaintiffs obtained a decree and also possession as against the defendants ? If so, its effect ?"

The learned Munsif remitted these two issues to the revenue Court for decision. The revenue Court held that after the lease Mt. Nathia's name was entered in the papers as a sir holder and the names of the defendants were recorded as sub-tenants on a rent of Rs. 6 per annum on

the basis of the lease. When the plaintiffs purchased the zamindari and the proprietary rights of Mt. Nathia their names were recorded in the column of proprietors and Mt. Nathia was recorded as an exproprietary tenant while the defendants were recorded as her sub-tenants. The revenue Court held that Mt. Nathia, even after the mortgage, was the owner of the sir plots and she could, in the ordinary course of management of the property, execute the lease. That the plaintiffs at the time of the purchase merely acquired Mt. Nathia's rights and they could not, therefore challenge the lease. That the defendants were the tenants of Mt. Nathia, but the plaintiffs having succeeded to the rights of Mt. Nathia by relinquishment the defendants were now the tenants of the plaintiffs who had no right to claim their ejectment. On issue 4 the revenue Court held that the plaintiffs had impleaded the defendants as subsequent mortgagees and had made certain allegations about the lease but had not claimed any relief on the basis thereof and the decree in that case or the sale under the decree did not entitle them to claim the relief prayed for in this suit. The learned Munsif accepted these findings, as he was bound to do, and dismissed the plaintiffs' suit.

[4] The plaintiffs filed an appeal against that decision and the lower appellate Court held that Mt. Nathia had no right to confer occupancy rights without the written consent of the mortgagees or without the sanction of the District Judge and relied on S. 17, Agra Tenancy Act of 1926. The lease was, therefore, voidable at the option of the mortgagees. The lower appellate Court further went on to hold that the rent reserved under the lease was not a fair rent and it was clear that the lease was detrimental to the interest of the mortgagees and was in contravention of the provisions of S. 66, T. P. Act before its amendment in the year 1929. The lower appellate Court held that the land could fetch Rs. 14-7-0 per year as rent instead of Rs. 6. The lessees were parties to the mortgage suit and the decree in that case was binding on them. They were merely sub-tenants of the exproprietary tenant and the exproprietary tenant having relinquished his rights in the plots the defendants had no right to remain in possession. In the result the appeal was allowed and the plaintiffs' suit was decreed and the lessees were directed to pay Rs. 14-7-10 per year as damages for the period in suit.

[5] In appeal learned counsel for the appellants has argued several points before me. His first contention is that the mortgagor had a right to execute the lease in due course of management of the property and it could not



be held under S. 66, T. P. Act that the security had become insufficient. I do not think that this contention is sound. Apart from the fact that the findings of the lower appellate Court are against the appellants, and so far as they are findings of fact they are binding on me, there is the further fact that the suit was filed for a sum much in excess of the amount for which the property was sold and the final decree was for a sum of over Rs. 800. As a result of this lease, if it was a valid and binding lease, the income of the property could never exceed Rs. 6 per annum and then there were onerous terms in the lease that the defendants were to make constructions, plant groves and dig wells and the lessor was bound to compensate the lessees if the lessees had to give up possession of the land. As a result of this lease, the property could not fetch more than Rs. 300 for which sum it was sold at auction in the year 1932 while the sum due under the mortgage was far in excess of that amount. I, therefore, agree with the finding of the Court below that the lease was detrimental to the interests of the mortgagees and thus rendered the security insufficient within the meaning of S. 66, T. P. Act and it was not binding on them.

[6] The second point was that the relinquishment of the exproprietary rights by Mamraj must be deemed to be in favour of all the cosharers and therefore the plaintiffs alone had no right to file a suit. This point was not taken in the Court below. It may be that by reason of a private arrangement or by partition Mamraj was the ex-proprietary tenant of only the plaintiffs. For a proper decision of the point findings on questions of fact would be necessary. I cannot, therefore, allow learned counsel to raise this point for the first time in second appeal.

[7] Learned counsel has also argued that the lower appellate Court erred in holding that the lease created occupancy rights and has urged that the execution of a permanent lease is not the same as the creation of occupancy rights and that therefore the lower appellate Court was wrong in holding that the lease was bad under S. 17, Agra Tenancy Act. It appears that there is conflict in the decisions of the Board of Revenue on the question whether a permanent lessee is or is not an occupancy tenant. It is not necessary for me to discuss the authorities of the Board on the point. I have already held that the lease was not binding on the mortgagees as it was executed without their consent and had made the security insufficient within the meaning of S. 66, T. P. Act before its amendment. The lower appellate Court has cited several authorities for the proposition that a lease executed without the consent of the mort-

gagee and which is prejudicial to his rights, inasmuch as it makes his security insufficient would not be binding on him. Therefore even if S. 17, Agra Tenancy Act, 1926, was not applicable, it must be held that the lease was not binding on the mortgagees by reason of the provisions of the Transfer of Property Act.

[8] The last point urged on behalf of the appellants is that even if the lease was not binding on the mortgagees it was binding on the mortgagor and the mortgagees after their purchase were only entitled to rent from the mortgagor who had become the ex-proprietary tenant. The contention on behalf of the appellants is that the plaintiffs were not entitled to anything more than the rent payable by an ex-proprietary tenant and the relinquishment of the ex-proprietary rights could not place them in a better position and the lessees in a worse position and the lessees were, therefore, entitled to remain in possession of the land in accordance with the terms of the lease. The position appears to me to have become a little complicated by reason of the fact that in the suit filed on behalf of the mortgagees, though it was mentioned that the lease was bad, no declaration to that effect was asked for. The fact, however, remains, that a decree for sale was passed against all the defendants and in execution of the decree the property was sold. After considerable hesitation I have come to the conclusion that the result of the lower Court's finding, which I have upheld, that the lease was not binding on the mortgagees and the fact that the lessees did not put in any defence when they were impleaded on the allegation that the lease was bad and a decree for sale against the mortgagor as well as the lessees was passed, must be that the auction purchasers must be deemed to have purchased the property free from any liability under the lease. Mt. Nathia became the ex-proprietary tenant of the six plots after the auction sale. She was, therefore, entitled to remain in possession of the plots on payment of rent, at the rate payable by an ex-proprietary tenant, which was assessed to be Rs. 6-14-0. So long as Mt. Nathia remained in possession, the defendants-appellants could claim against her to continue in possession on payment to her of Rs. 6 the rent fixed in the lease. As soon as Mt. Nathia gave up her possession, the right of the defendants-appellants to continue in possession must also cease. Their possession was merely as sub-tenants and their rights must come to an end on the extinction of the tenancy. This consequence must necessarily follow from the finding that the mortgagees and necessarily the auction purchasers who purchased the property in execution of the mortgage decree for sale were not bound by the lease. On the death



of Mt. Nathia the ex-proprietary rights came to her son, Mamraj, who having relinquished the same, the defendants, who were merely his sub-tenants, had no right to continue in possession. Learned counsel has urged that if they were ejected they must be given compensation for any improvements that might have been made by them. The difficulty again is that his clients do not seem to have claimed compensation in the Courts below. There is no finding that they have made any improvements and I do not think that I can at this stage let them raise a plea which would mean fresh enquiry on questions of fact.

[9] I dismiss this appeal with costs. Leave to file an appeal under the Letters Patent is granted.

K.S. *Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 243 [C. N. 103.]**  
MALIK J.

*Cantonment Board, Meerut—Defendant—Appellant v. L. Kamta Prasad—Plaintiff—Respondent.*

Second Appeal No. 1982 of 1944, Decided on 2-11-1945, from decision of 2nd Civil Judge, Meerut, D/- 26-1-1944

(a) Cantonments Act (1924), S. 272 — Applicability.

Section 272 would apply only to such cases where from the facts proved it appears that the notice was given by the Board according to the terms of the Act. But where it is found that the notice itself was bad because the alleged encroachments were not on a public street but were on the land belonging to the plaintiff and therefore a notice under S. 187 was not justified, S. 272 would have no application. [Para 4]

(b) Cantonments Act (1924), S. 108 — Suit for injunction—Against whom can be filed—Cantonment Land Administration Rules (1937), Rr. 4 and 9.

Rule 4 of the Cantonment Land Administration Rules shows that land is classified as land which vests in the Crown and land which vests in the Board, and in the latter class is land which is vested in the Board under S. 108 and it is called Class "C" land. By R. 9 the management of this land is also vested in the Board so that the Board has both the ownership as well as the management and therefore a suit for injunction restraining the Board from demolishing a structure built by the plaintiff on the alleged public street can only be filed against the Board and not against the Central Government. [Para 5]

(c) Civil P. C. (1908), S. 100—Question of fact—Whether notice under S. 273, Cantonments Act, was given to Cantonment Board is a question of fact and will not be allowed to be raised for the first time in second appeal. [Para 6]

C. P. C. — ('44-Com.) S. 100, N. 51, Pt. 16; N. 55, Pt. 16.

S. A. Rafique — for Appellant.

R. B. Jaini — for Respondent.

**Judgment.**—This appeal is on behalf of the Cantonment Board, Meerut. The plaintiff is the

owner of a shop within the Cantonment area numbered as 226-A. There is another floor on the top of this shop and there is a staircase on plot No. 231 which leads up to the first floor. In between the staircase and the shop is a small plot of land which, according to the plaintiff, had a door towards the east belonging to the plaintiff and it had two pillars as its western end to support the construction above. The plaintiff filed this suit in the year 1942 on the allegation that the door flaps facing the opening towards the Sadar Bazar Road had got worn out and they were replaced by the plaintiff about three years before the suit and the Cantonment Board without any justification gave the plaintiff a notice under S. 187, Cantonments Act, for the removal of the pillars and the door. The plaintiff alleged that the covered land belonged to the plaintiff and had been in the exclusive possession of the plaintiff from a very long time. On behalf of the Cantonment Board a written statement was filed in which it was alleged that the land in between the staircase and the shop was a public street and the plaintiff had no right to build the pillars and the door which had been recently constructed and they must be removed.

[2] The lower appellate Court has found that the land in between the staircase and the shop belonged to the plaintiff. The plaintiff's case was that he had purchased this land under a sale deed dated 17th July 1893. Learned counsel for the Board submitted that the learned Civil Judge had misinterpreted the sale deed and his finding on the point should not, therefore, be accepted. No such ground was taken in the memorandum of appeal, but I have had the sale deed read out to me and have compared the boundaries given in the sale deed with the plan attached to the plaint. It appears from the boundaries that the whole of the property was treated as one block and not that there were two separate blocks separated by a public lane. Further from the body of the sale deed it is clear that the land which had been built on was also being sold. The learned Judge not only relied on the sale deed but on the other evidence in the case and recorded a finding which I consider is a finding of fact—that the land belongs to the plaintiff and is not a public street.

[3] Three other points have been urged on behalf of the Cantonment Board, firstly that the suit was not maintainable by reason of S. 272, Cantonment Act, secondly that the suit should have been brought against the Central Government and not against the Cantonment Board, and lastly that there was no notice given to the Board as required by S. 273, Cantonments Act.



[4] I have already said above that the notice for demolition was given by the Board under S. 187, Cantonments Act. Section 187 (1) reads as follows:

"No owner or occupier of any building in a cantonment shall, without the permission in writing of the Board, add to or place against or in front of the building any projection or structure overhanging, projecting into, or encroaching on, any street or any drain, sewer or aqueduct therein."

It would appear from the above that only projections or structures overhanging, projecting into, or encroaching on, any street or any drain, sewer or aqueduct therein can be demolished under that section. The case of the Board was, as I have already said, that it was a public street and therefore the Board had a right to have the constructions demolished as they were encroaching on the street. The lower appellate Court has held, and I have accepted the finding of that Court, that the constructions do not encroach on any street but are on land which belongs to the plaintiff. Learned counsel has, however, argued that even on that finding a suit for an injunction would not be maintainable by reason of S. 272, Cantonments Act. The only relief prayed for by the plaintiff was in these terms:

"A permanent injunction may be issued against the Board restraining the same from demolishing the plaintiff's door and pillar."

Learned counsel has argued that there is nothing to show that the notice was not given in good faith and S. 272 provides that no suit is maintainable against the Board for anything done in good faith, or intended to be done in good faith. I asked learned counsel whether on the findings recorded above the plaintiff was entitled to any relief at all, if his argument is accepted, as S. 274 of the Act which provides for appeals against certain orders of the Board does not provide for any appeal to any higher authority against an order issuing a notice under S. 187 of the Act. His suggestion was that the plaintiff could file a suit for declaration of title and then ask for an ancillary relief of injunction. If civil Courts are absolutely barred from issuing an injunction, I do not see what difference it would make if the plaintiff claims a declaration and then an injunction. To my mind, S. 272 of the Act would apply only to such cases where from the facts proved it appears that the notice was given by the Board according to the terms of the Act, that is, if it had been held that the encroachment was on a public street then the Board would be justified in issuing a notice under S. 187 and no suit could be maintained against such an order. But where it is found that the notice itself was bad because the encroachments were not on a public street but

were on the land belonging to the plaintiff and therefore a notice under S. 187 was not justified, I think S. 272 would have no application.

[5] As regards the second point, I agree with the decision of the lower appellate Court that the suit was maintainable against the Board. Under S. 108, Cantonments Act,

"subject to any special reservation made by the Central Government all property of the nature hereinafter in this section specified which has been acquired or provided or is maintained by a Board shall vest in and belong to that Board and shall be under its direction, management and control."

and then a list of properties is given and all streets and pavements etc., are included in that list. Learned counsel, however, relied on R. 48 of the Cantonment Land Administration Rules, 1937, and urged that only the management was vested in the Board and not the ownership. A reference, however, to R. 4 of the Rules would show that land is classified as land which vests in the Crown and land which vests in the Board, and in the latter class we have land which is vested in the Board under S. 108 of the Act and it is called Class "C" land. By R. 9 the management of this land is also vested in the Board so that the Board has both the ownership as well as the management and, to my mind, therefore the suit could only be filed against the Board and not against the Central Government.

[6] As regards the last plea of notice, no such point was raised in either of the Courts below, nor was it raised in the written statement. For ought we know notice may have been given to the Board as required by S. 273, Cantonments Act. It is, however, a question of fact and the point not having been raised in the lower Courts I will not be justified in allowing learned counsel to raise a new point in second appeal. I find that even in the grounds of appeal in this Court no such point was raised. The appeal is, therefore dismissed with costs. Leave to file an appeal under the Letters Patent is granted.

V.R.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 244 [C. N. 104.]**

**VERMA AND SANKAR SARAN JJ.**

*Naubahar Singh and others — Appellants  
v. Aditvir Singh and others—Respondents.*

First Appeal No. 204 of 1944, Decided on 27-3-1946, from order of Special Judge, first grade, Bijnor, D/-23-2-1944.

U. P. Encumbered Estates Act (25 [XXV] of 1934), Ss 45 and 9 (3)—Order under S. 9 (3)—Appeal.

An order under S. 9 (3) receiving the written statement of a creditor's claim is not an order "finally disposing of the case" within the meaning of S. 45 and is not appealable: 32 A. I. R. 1945 Oudh 171 and F. A. No. 173 of 1944 (All.), *Rel. on.* [Para 2]



*Cases referred:—*

1. F. A. No. 173 of 1944 (All), Mt. Sakina Bibi v. Ram Chander.
2. ('45) 32 A. I. R. 1945 Oudh 171, Rukmangad Singh v. Bhikham Singh.

*Shabd Saran*—for Appellants.

*G. B. Agarwala*—for Respondents.

**Judgment.**—The appellants made an application under S. 4, U. P. Encumbered Estates Act and the usual proceedings followed. Respondent 1 Kr. Aditvir Singh, was not shown by the landlords applicants in the list of their creditors. The case proceeded and decrees under S. 14 were passed and were sent to the Collector under S. 19. Thereafter, Aditvir Singh filed a written statement of claim and alleged that he held a final mortgage decree against the landlords applicants, that the latter had fraudulently suppressed his name and that he was, therefore, entitled to the benefit of S. 18, Limitation Act and requested the Special Judge to receive his statement of claim under S. 9 (3) of the Act. The landlords applicants and the other creditors opposed Aditvir Singh's request. The learned Special Judge came to the conclusion that there had been fraud on the part of the landlords applicants, and passed an order that Aditvir Singh's written statement of claim be admitted subject to the payment of certain costs. This appeal is by the landlords applicants and is directed against that order.

[2] A preliminary objection has been raised on behalf of the respondent Aditvir Singh to the effect that no appeal lies against such an order. We have heard learned counsel for the appellants at great length and have come to the conclusion that the preliminary objection must be upheld. All that has happened is that the Special Judge has received the written statement of Aditvir Singh's claim under S. 9 (3), Encumbered Estates Act. An appeal against an order lies only if the order is one "finally disposing of the case" (S. 45). In our judgment, the order against which this appeal is directed is not such an order. We may refer to First Appeal No. 173 of 1944,<sup>1</sup> which was decided by a Bench of this Court on 28.2.1946. The same point arose for consideration in that case and the facts of that case were similar to those of the present one and it was held that no appeal lay. We may also refer to the decision of a Bench of the Chief Court at Lucknow in A. I. R. 1945 Oudh 171.<sup>2</sup> There the claim was under S. 11 (2) of the Act and the Special Judge had admitted the claim under the proviso to that sub-section. Learned counsel for the appellants has sought to distinguish that case on the ground that it was not a case of a claimant under S. 9. The argument, however, is without force, for, both in S. 9 (3) and the proviso to S. 11 (2), the material words

are the same, namely, "the Special Judge may . . . receive." All that has happened in this case is that the Special Judge has received the written statement of claim filed by Aditvir Singh.

N.S.D.

*Appeal dismissed.*

### A. I. R. (34) 1947 Allahabad 245 [C. N. 105.]

BRAUND AND YORKE JJ.

*Manohar Lal and another—Defendants—  
Appellants v. Benares Bank Ltd —  
Plaintiffs — Respondents.*

Appeal No. 177 of 1942, Decided on 29-11-1945, from decision of Civil and Sessions Judge, Agra, D/- 5-12-1940.

(a) U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), S. 30 — Relevant year for purpose of section — U. P. Agriculturists' Relief Act (27 [XXVII] of 1934, S. 2 (2), proviso 2.

A debtor who claims the benefit of S. 30 must show that he was an agriculturist at the date of the advance. Therefore, the relevant year for the purpose of S. 30 in which the debtor has to show that he was not assessed to income-tax beyond the specified rate is not the year of the last assessment before the suit was brought but the year in which the loan was taken: 23 A. I. R. 1936 All. 449, held overruled by 30 A. I. R. 1943 All. 190 (F.B.). [Para 8]

(b) U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), S. 2 (2) (a) and proviso 2 — Burden of proof.

When a debtor comes to the Court claiming the concessions of the Act, the obligation lies on him to prove himself within S. 2, sub-s. (2) as an agriculturist, both positively under sub-s. (a) and negatively under the proviso. [Para 12]

#### *Cases referred:—*

1. ('36) 1936 A. L. J. 501 : 23 A. I. R. 1936 All. 449 : 163 I. C. 828, Raj Narain v. Bindaban
2. ('43) 30 A. I. R. 1943 All. 190 : I. L. R. (1943) All. 502 : 206 I. C. 324 (F.B.), Ganeshi Lal v. Shiam Lal.

*J. N. Chatterji* — for Appellants.

*Mukhtar Ahmad and M. L. Chaturvedi* —

for Respondents.

**Judgment.**—This is an appeal from a decree of the Civil and Sessions Judge, Agra passed nearly five years ago in a matter which is relatively simple.

[2] The suit was one by the Benares Bank Ltd. and its Liquidator against the two promisors under a promissory note dated 23rd or 24th April 1937. The promissory note was executed by the two defendants, Manohar Lal, described in the plaint as a Vakil of Meerut, and Krishna Lal who was his brother. The promissory note itself is in these words:

"On demand I/we jointly and severally promise to pay at Agra, to the order of the Benares Bank Ltd., the sum of rupees five thousand three hundred and eighty seven and annas thirteen only with interest at one per cent., over Imperial Bank of India published rate of interest for Demand Loans with a minimum of ten per cent. per annum with monthly rests on every 30th June and 31st December, for value received . . . ."

[3] Historically, it is common ground that this promissory note was the last of a series of pro-



missory notes at three years' intervals each one in renewal of the last, the original promissory note being dated 31st May 1928 to secure repayment of a principal sum of five thousand rupees. It is also a fact that in the beginning the Bank also took what is described as a "security bond" which amounted to a charge on certain property of the two brothers at Agra, but when it came to suing on the promissory note after its liquidation, the bank dropped the security and brought a suit in the simplest possible form against the two promisors claiming payment of the principal and interest then due from them jointly and severally. We do not think it necessary to set out the plaint in detail except to observe that on the face of it, it is unmistakably a claim against the two defendant brothers as principal co-debtors jointly and severally. The amount claimed comes in the aggregate to Rs. 6750 which, of course, includes accrued interest from the date of the promissory note.

[4] The written statements—or rather the one written statement—are of more interest. The only one of the defendants who actually and formally filed a written statement was the defendant Krishna Lal, defendant 2. He filed a written statement on 19th September 1940 on his own behalf saying, in effect, that at the time of taking the loan and at the time of the suit, he was an agriculturist and, as such, was entitled to all the benefits of the Agriculturists' Relief Act, including the benefit of ss. 3 and 30 of that Act. He went on to say that, if accounts were taken under s. 30, it would be found that he had paid back the whole of the principal due under the loan and he, therefore, claimed to have an account on that footing, which, if the facts were as he alleged, would in effect have meant that he owed nothing or practically nothing to the plaintiff bank. Now, the interesting thing is that his co-defendant, Manohar Lal, who, at any rate, on the face of the promissory note, was jointly and severally liable on it, did not trouble to put in a written statement at all and, at one stage of the suit, the proceedings were treated on this account by the Court as against him as being *ex parte*. But on 19th September, incidentally the same date as his brother filed the written statement, the Vakil made a written application to the Civil Judge in which he explained that for various reasons "being a practising lawyer" he could not manage to appear in the Court and asking that the proceedings might go on against him *inter partes* and not *ex parte* and he ended up this peculiar document by saying that he "submitted that this defendant adopts the defence filed by defendant 2." The learned Civil Judge—somewhat unfortunately, we think—seems to

have allowed this very slipshod course to have been followed and the result was that the proceedings went on with a written statement by defendant 2, no written statement whatever by defendant 1 and the very peculiar submission made by the latter that he had adopted the defence of defendant 2. We desire to point out for the benefit of the learned Civil Judge that it is always much better if matters of this kind are conducted regularly, and that if he was disposed to allow defendant 1 to appear, he should certainly have insisted on a written statement being filed in the proper way. We are not prepared to say that it would have made very much difference in this case, but there are many cases in which it might well make a great deal of difference. However, that may be, we feel that we must, at this stage in appeal, treat defendant 1 as having been before the Court raising—or perhaps supporting—those pleas which are contained in his brother's written statement.

[5] The learned Judge in a commendably short judgment discussed the issue whether the defendants were agriculturists. The whole matter turned on that. In the first place we can perhaps dispose quickly of one suggestion that has been made to us in appeal which is the assertion that defendant 1, the Vakil Manohar Lal, never was a principal debtor on this promissory note at all but throughout figured as a mere surety and, therefore, as we understand it, his status as an agriculturist or not is neither here nor there. In our view, this suggestion cannot be supported for a moment. The promissory note on the face of it is as clear as anything can possibly be. Manohar Lal is there described to be jointly and severally liable with Krishna Lal and, in any case, it would be a most peculiar thing to find the surety figuring in the promissory note in front of the principal debtor. The only shred on which the appellant hangs this suggestion is that it seems to have been the fact that the proceeds of the promissory note in the first place went into the Bank account of Krishna Lal alone. That may well be true; but it proves nothing. Debtors may very well be joint and several debtors, notwithstanding that one of them takes, or keeps in his Bank account, the money that has been borrowed. We propose to deal with that issue very quickly by saying that there is nothing on the facts before us which could justify us in saying that the only capacity in which Manohar Lal joined in this promissory note was that of a surety or as it is described in s. 2, U. P. Agriculturists' Relief Act, "for the purpose of adding his name as security." If there were any doubt about this, we think it would be completely resolved by a letter Ex. 5



written by Manohar Lal himself on 2nd June to the Bank in which he said that the promissory note was signed by his brother Krishna Lal and himself and asked that the five thousand rupees in question might be credited to his brother's Bank account. Nothing on earth could be plainer than that for the purpose of explaining that both of them were jointly and severally liable.

[6] The more difficult point, however, is the one which we will now deal with. The learned Judge in his judgment first dealt, as we have already said, with the issue of whether the defendants were agriculturists. It has to be remembered that there was no written statement of defendant 1, before the Court and in that sense, it is extremely doubtful whether there was any issue in this respect affecting defendant 1. All he had done was to adopt his brother's written statement and even in that written statement the only allegation is that Krishna Lal was an agriculturist and not that Manohar Lal was an agriculturist. But the learned Judge appears to have given defendant 1 the benefit of doubt and he proceeded to discuss whether he was an agriculturist. He first of all examined a certain *khewat* of certain village for the year as far back as 1926 and he came to the conclusion from what he found in that *khewat* that both the defendants were persons paying land revenue not exceeding a thousand rupees per annum. In other words, he found that sub-s. (2)(a) of S. 2, U. P. Agriculturists' Relief Act, was satisfied and that up to that point, the defendants were agriculturists. He then went on to say that :

"The plaintiff has proved that defendant 1 was assessed to income-tax for the last financial year for which assessments were made by the Income-tax Department when . . . . . semble before . . . . . the suit was filed . . . . ."

[7] Now, what this means is that he found that notwithstanding that defendant 1 had succeeded in bringing himself within sub-cl. (a), nevertheless the plaintiff had succeeded in taking him out of it again under the second of the provisos to S. 2 (2) by saying that in the year of the last assessment before the bringing of the suit, he had paid income-tax.

[8] Now, had the test been whether defendant 1 had paid income-tax in the year of the last assessment before the suit was brought, we should have thought that the learned Judge was perfectly right in coming to that conclusion. It had been proved that the defendant had paid income-tax in that year and if it was to be contended on his behalf that the amount paid was not such as to bring it within the proviso, then it was for him to establish it. But, unfortunately, the matter is not quite as simple as

that. At the time when the learned Judge heard this case, the law in respect of this matter seems to have been governed by a Bench decision of two learned Judges of this Court including the late Chief Justice in 1936 A. L. J. 501.<sup>1</sup> The learned Judges in that case, in particular in making reference to a case under S. 30, U. P. Agriculturists' Relief Act, had unmistakably decided that the relevant year of assessment for the purpose of the proviso was the last occasion on which the debtor was assessed before the suit was brought. This has to be read in reference to S. 30, U. P. Agriculturists' Relief Act, which applies only to that Chapter of the Act which contains S. 3 but does not apply to that Chapter of the Act which contains S. 30. It follows, therefore, that at the date the learned Judge decided this case in 1940, the relevant year for the purpose of S. 30 of the Act in which the debtor would have had to show that he was not assessed to income-tax beyond the specified rate was the year of the last assessment before the suit was brought and not the year in which the loan was taken. Since 1940, however, there has been an alteration in the law in consequence of the Full Bench case in A.I.R. 1943 ALL. 190.<sup>2</sup> In that case—again in reference to a case under S. 30, U. P. Agriculturists' Relief Act—the Full Bench has established that a debtor who claims the benefit of S. 30 must show that he was an agriculturist at the date of the advance. Though the earlier case in 1936 was distinguished and explained, it appears to us that this latter decision of the Full Bench must really be taken to have overruled it. However that may be, it is the decision of this Full Bench that constitutes the law in this Court to-day.

[9] In these circumstances, so far as related to any question in this suit under S. 30, U. P. Agriculturists' Relief Act, the result is that the learned Civil and Sessions Judge, through no fault of his own, proceeded on an entirely wrong basis and instead of the relevant year being the year before the suit was filed, the relevant year really was the year in which the loan was taken. For that reason, so far as the question is one relating to the defendant's right to the benefit of S. 30 of the Act, we shall have to consider it again, but so far as S. 3 of the Act is concerned, we may say at once that we think that the learned Judge is perfectly right and that there is no occasion for us to differ in any way from his opinion. The remainder of this judgment, therefore, concerns the question merely as regards S. 30, U. P. Agriculturists' Relief Act.

[10] The course, therefore, which matters have taken is that the only evidence at the trial is that defendant 2, Krishna Lal, who has been into the witness-box in support of his own



written statement, produced the *khewats* to show that he and his brother were technically agriculturists within the meaning of sub-s. (a) of S. 2 (2) of the Act and he has sworn that he himself was an agriculturist. He has put it quite simply in that language "I am an agriculturist"; and nothing more. Defendant 1. Manohar Lal, has not been near the witness box and we have no evidence on the record whatever, beyond the *khewat*, as to whether he was an agriculturist or not. It is with reference to defendant 1 that the question principally arises because, as the learned Judge points out, if defendant 1 was a non-agriculturist, then the case will be one of a non-agriculturist joining with an agriculturist and accordingly, under proviso 3 to sub-s. (2) of S. 2, neither of them would become entitled to the benefit of the Act.

[11] We have been pressed to say that once evidence has been given to the effect that a debtor is what we may describe as a technical agriculturist under sub-s. (a), then the onus lies with the plaintiff—the creditor—of showing or at least of asserting, that he is really not the agriculturist he seems to be, because, by virtue of the second proviso he is a person paying income-tax beyond a certain amount. We do not entirely agree with that view. It has to be remembered that this is an Act which gives to a certain class of person, to wit an agriculturist, certain privileges; and we should have thought that it was a safe starting point to assume that, before a person can take advantage of the privileges of this Act, it is for him to show that he comes strictly within that class which is entitled to those privileges. In other words, the debtor must prove that he is an "agriculturist". And to do that, in our view, it is necessary for him to do something more than to say that he is a person who does not pay land revenue exceeding a thousand rupees per annum. In our view, it is necessary for him not only to say that, but to say also that he is a person who is not assessed to income-tax beyond that rate which would exclude him from the class of agriculturists. A moment's reflection, we think, will show that this is so. It has to be remembered that the plaintiff, that is to say the creditor, is a person who himself has not access—indeed he is statutorily debarred from access by S. 54, Income-tax Act, 1922—to the only material from which it can be shown whether the debtor has paid income-tax on a particular sum in a particular year. Section 54, Income tax Act, in effect, makes it impossible in all cases for a private individual to make inquiries from the income-tax authorities and only in a very limited class of case even for the authorities, such as a Court of Law, themselves to require facts and documents to be produc-

ed. And when one looks at sub-s. 3 (m) of s. 54, Income-tax Act, one finds that even then the only thing that the Court itself could compel the Income-tax authorities to disclose is the very limited fact of whether a particular person has paid income-tax in a particular year. There is no way in which even the Court itself could find out whether a particular person had paid income-tax on a particular sum in any particular year.

[12] It is apparent, therefore, that it would be impossible for the plaintiff himself to prove the facts required by the second proviso to S. 2, U. P. Agriculturists' Relief Act and it would be equally impossible even for the Court itself to compel production of proof except to the limited extent whether the debtors paid income-tax in a particular year. From this what appears to us to follow, is that this is a case in which those facts which are covered by the second proviso to S. 2 are such as are, not merely "especially" but "solely" within the knowledge of the debtor himself. If ever there was a case which, if it is not covered precisely by the language of S. 106, Evidence Act, is covered by the principle of that section, this case, in our view, is it. Here is a case in which a man comes to the Court, claiming against his creditor the great concessions which are provided by the U. P. Agriculturists' Relief Act. In order to obtain those concessions he has to prove a certain character which is defined both positively and negatively—positively by sub-cl (a) and negatively by the second proviso. It would, to our minds, be an unreasonable proposition if he were allowed to give evidence to show that he qualified under sub-s. (a) and to leave it at that; without disclosing that which *ex-hypothesi* must necessarily be within his own "especial", if not exclusive, knowledge, namely, what income-tax he has paid in the relevant year. To take any other view of the obligation of a debtor claiming under sub-s. (2) would, as we see it, be tantamount, in any case in which that debtor was minded to be dishonest, to giving him a licence to prove a falsehood on the off-chance that his creditor might not be able to disprove it. For these reasons, we are satisfied that when a defendant comes to the Court claiming the concessions of the U. P. Agriculturists' Relief Act the obligation lies on him to prove himself within S. 2, sub-s. (2), as an agriculturist, both positively under sub-s. (a) and negatively under the proviso. And that reasoning applies with no less force to a case in which the defendant in question has not troubled to put in a written statement but has said in the most casual possible way that he relies on the written statement of someone else. Nor is the matter made any better when the gentleman himself is a Vakil.



[13] We arrive, therefore, at the same conclusion as the learned Judge of Agra, though by a somewhat different road. We think that defendant 1 has not been proved to be an agriculturist and, therefore, that this is a case under proviso 3 of an association between a non-agriculturist and an agriculturist which deprives them both of the benefits of s. 30 of the Act. We, therefore, think that the appeal must be dismissed.

[14] We would note that the decree has been drawn up in the most careless manner. As it stands, it is unintelligible. It is stated on the form that the plaintiff claimed Rs. 6,750 with *pendente lite* and future interest and costs of the suit and it is further stated:

"It is, therefore, ordered that the plaintiff's claim be decreed with costs against both the defendants. And that the sum of Rs. 6,750 be paid by the defendants to the plaintiff from December 5, 1940 up to the date of realization."

After the words "the plaintiff" there has evidently been an omission of a direction in regard to interest *pendente lite* and future. It appears to us in the light of the earlier wording of the decree that this was an accidental error in the preparation of the decree which should be remedied. One other slight alteration is also required and the decree should finally read as follows:

"And that the sum of Rs. 6,750 be paid jointly and severally by the defendants to the plaintiff with interest *pendente lite* and future interest from December 5, 1940 up to the date of realization of the said sum and with Rs. 668 8-0 on account of costs of the suit."

The respondents are entitled to their costs of this appeal.

V. R.

*Order accordingly.*

**A. I. R. (34) 1947 Allahabad 249 [C. N. 106.]**  
MALIK J.

*Bashir Beg — Decree-holder—Appellant v. Wajid Ali—Judgment-debtor—Respondent.*

Exn. Second Appeal No. 1673 of 1945, Decided on 3-5-1946.

Limitation Act (1908), Art. 182 (4) — Amendment of decree under S. 8, U. P. Debt Redemption Act, (13 [XIII] of 1940)—Starting point for execution application.

Though sub-s. (2) of S. 8, U. P. Debt Redemption Act, provides that the decree shall be deemed to bear the date of the original decree for the purposes of appeal, the date of the amendment is supposed to be the date of the decree. The date of the amendment cannot be taken to be the prior date, that is the date of the original decree. The order of amendment therefore must bear the date on which the order was made. An application for execution made within three years of the date of amendment is within time under Art. 182 (4), Limitation Act : 33 A. I. R. 1946 All. 89 (F. B.), *Rel. on*; 24 A. I. R. 1937 Oudh 312 (F. B.), *Dissent.* [Para 3]

*Cases referred:—*

1. ('46) 1946 A. L. J. 3 : 33 A. I. R. 1946 All. 89 : I. L. R. (1946) All. 413 : 225 I.C. 200 (F.B.), *Manmohan Lal v. Raj Kumar Lal.*

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2. ('37) 24 A.I.R. 1937 Oudh 312 : 13 Luck. 287 : 168 I. C. 318 (F. B.), *Jhamman Lal v. Surat Singh.*

*Shabd Saran*—for Appellant.

*J. G. Kumar*—for Respondent.

**Judgment.**— This appeal has been filed by the decree-holder whose application for execution was dismissed on the ground that it was barred by limitation. The appellant brought a suit, No. 354 of 1935, in the Court of the Munsif of Amroha on the basis of a mortgage. The suit was decreed and a final decree for sale was passed on 4-2-1936. The property included in that decree was, however, misdescribed and the decree was amended on 30-4-1938, under S. 152, Civil P. C. So far as the amendment of 1938 is concerned it was merely a correction of a clerical error and I do not want to express any definite opinion as to whether it can be said that the decree was amended in the year 1938. The judgment-debtor being an agriculturist was entitled to the benefit of the Temporary Postponement of Execution of Decrees Act (10 [X] of 1937) and the decree-holder therefore did not apply for execution. The Act was repealed with effect from 31-12-1940. The judgment-debtor thereafter applied for amendment of the decree under S. 8, U. P. Debt Redemption Act (13 [XIII] of 1940). The decree was amended on 21-3-1941. The decree-holder filed this application for execution on 3-3-1944.

[2] The trial Court held that the application for execution was within time and dismissed the objection of the judgment-debtor. The lower appellate Court has upset that decision on the ground that even if the benefit of the Temporary Postponement of Execution of Decrees Act is given to the decree-holder he would be entitled to a further period of three years from 4-2-1936, and that the application for execution should, therefore, have been filed by 4-2-1942. The application having been filed on 3-3-1944, it was, according to the lower appellate Court, clearly barred by limitation.

[3] The lower appellate Court has not taken into consideration cl. (4) of Art. 182, Limitation Act, which says that for the execution of a decree or order of any civil Court not provided for by Art. 183, or by S. 48, Civil P. C., the period of limitation is three years from the date of amendment where the decree has been amended. There can be no doubt that the decree was amended under S. 8, U. P. Debt Redemption Act on 21-3-1941. If the provision of Art. 182 is applicable, there can be no doubt that the application filed on 3-3-1944, was within three years of the date of amendment. Learned counsel for the judgment-debtor has, however, relied on sub-s. (2) of S. 8, Debt Redemption Act, which provi-



des that a decree amended under the provisions of sub-s. (1) shall be deemed to bear the date of the original decree. It is nowhere laid down in the sub-section that the date of amendment shall be deemed to be the date of the original decree. The provision is, to my mind, unnecessary, unless it was enacted as a matter of precaution, as I know of no law which would entitle a Court amending a decree, except by way of review under O. 47, Civil P. C., where the previous decree is set aside and a fresh decree is passed, to change the date of the original decree. I have dealt with this matter at some length in 1946 A. L. J. 3.<sup>1</sup> My decision in that case no doubt was not in accordance with the majority view, but I can find nothing in the judgment of the other learned Judges which would compel me to hold that the date of amendment must also be deemed to be the date of the original decree. On the other hand, the Hon'ble the Chief Justice has observed as follows :

"All that clause (2) provides is that the amended decree 'shall be deemed to bear the date of the original decree' and not that the amended decree *shall actually* bear the date of the original decree. It is inevitable that the date appended to the amended decree will be the date on which the original decree is amended and for the purposes of limitation governing appeals, the actual date of the decree and not the date that the decree is 'deemed to bear' is the relevant date. To put the matter in another way. In view of the provisions of clause (2) of S. 8, the notional date of the amended decree is the date of the original decree, but in fact the actual date of the amended decree will be the date on which the decree was amended, and the limitation for appeal will be computed from the actual date that the amended decree bears. A party aggrieved from the amended decree can, therefore, appeal against the decree, within the period of limitation allowed by the Limitation Act."

If I understand this correctly, it means that though sub-s. (2) provides that the decree shall be deemed to bear the date of the original decree for the purposes of appeal the date of the amendment is supposed to be the date of the decree. There is nothing in this judgment which would compel me to hold that the date of amendment must be taken to be the prior date, that is the date of the original decree. The judgment of Hon'ble Allsop J. is still more clear on the point. He held that the order amending the decree is a decree and it must bear the date when the order of amendment was passed. He has said :

"I am satisfied that an appeal must lie either against the amended decree itself or against the direction that the decree should be amended."

The order of amendment, therefore, must bear the date on which the order was made. In this view of the matter the decree-holder can execute his decree within three years of the date of amendment, that is within three years of

21-3-1941. As I have already said, the application was within time from that date.

[4] Learned counsel for the respondent has relied on a Full Bench decision of the Oudh Chief Court in support of his contention. Section 30, U. P. Agriculturists' Relief Act, (27 [XXVII] of 1934), provides for amendment of decrees by reduction in the rate of interest. Sub-section (3) of S. 30 is to the effect that a decree amended in accordance with the provisions of sub-s. (2) shall be deemed to bear the date of the original decree and notwithstanding any provision in any law to the contrary, no appeal shall lie from any order amending a decree under that sub-section." It would be noticed that the language of sub-s. (3) of S. 30, Agriculturists' Relief Act, is very similar to the language of sub-s. (2) of S. 8, Debt Redemption Act. Dealing with sub-s. (3) of S. 30, Agriculturists' Relief Act, Srivastava Ag. C. J. in A. I. R. 1937 Oudh 312<sup>2</sup> at page 316, held as follows :

"As regards the argument based on sub-s. (3), S. 30, which provides that a decree amended in accordance with the provisions of sub-s. (2), shall be deemed to bear the date of the original decree, it would be enough to say that the object of the sub-section appears simply to be that the decree-holder should not be allowed to claim a fresh period of limitation from the date of the amendment under Art. 182 (4), Sch. 1 to the Limitation Act."

It is not clear to me how the point arose in that case and there is no discussion of that point in the judgment of any of the other learned Judges. So far as I can see, the observations were *obiter*, and with great respect to the learned Judge I am not prepared to follow his view.

[5] In my opinion, the application for execution was, therefore, within time and the lower appellate Court erred in rejecting the same. For the reasons given above, I allow this appeal, set aside the order of the lower appellate Court and restore that of the Court of first instance with costs in all Courts. Leave to file an appeal under the Letters Patent is granted.

D.S.

*Appeal allowed.*

**A.I.R. (34) 1947 Allahabad 250 [C. N. 107.]**

ALLSOP AG. C. J.

*Ram Sarup — Applicant v. Emperor.*

Criminal Ref. Nos. 1229 to 1252 of 1945, Decided on 18-4-1946, from order of Sessions Judge, Shahjahanpur, D/- 11-9-1945.

(a) Cotton Cloth and Yarn Control Order (1943), Cl. 14 — Exemption from conviction.

Persons charged with a contravention of Cl. 14 of the Order should not be convicted for being in possession of cloth against the provisions of the order if they had a lawful excuse for such possession : 32 A. I. R. 1945 Nag. 249, *Approved*. [Para 2]

(b) Cotton Cloth and Yarn Control Order (1943), Cls. 14 and 15 — Cl. 15 has not repealed Cl. 14.



Clause 15 of the Order has not repealed Cl. 14. The order does not intend to say in Cl. 14 that a person should not be in possession of cloth of a certain kind and then in Cl. 15 that he might legally be in possession of it. These clauses read together clearly mean that no person is to be in possession of any kind of cloth unless the Textile Commissioner allows such person to be in possession of cloth of some kind on certain conditions. It cannot be inferred if no conditions are imposed by the Textile Commissioner that a person can be in possession of cloth unconditionally in contravention of the provisions of Cl. 14. If the Textile Commissioner imposes conditions, then anybody who complies with the conditions can be in possession of cloth but if no conditions are imposed, then nobody can be in possession of cloth at all: 32 A. I. R. 1945 Nag. 249, *Dissent*. [Para 2]

**(c) Interpretation of Statutes — Policy of law.**

It is not the business of a Court to question the policy of the law. Its business is to enforce the law such as it is. [Para 3]

**(d) Cotton Cloth and Yarn Control Order (1943) — Contravention of provisions — Punishment.**

The provisions of the Cotton Cloth and Yarn (Control) Order are made for the benefit of the people of the country and undue sympathy with those who contravene provisions of an order of this nature will lead to considerable inconvenience to the people at large. [Para 3]

*Case referred :—*

1. ('45) 32 A.I.R. 1945 Nag. 249: I.L.R. (1945) Nag. 909, Provincial Govt., C. P. & Berar v. Shamsher Ali.

*E. V. David and Waheed Ahmad Khan —*

for Applicant.

*Deputy Government Advocate —* for the Crown.

**Order.** — I have before me a number of references by the Sessions Judge of Shahjahanpur. They are Nos. 1229 to 1252 of 1945 inclusive. They are cases of men who have been convicted of contraventions of Cl. 14, Cotton Cloth and Yarn (Control) Order, 1943, and who have been sentenced to various fines not exceeding Rs. 200. Some of the persons convicted were found in possession of unmarked cloth. In their cases the learned Judge has suggested that the conviction should be set aside because there is no evidence on the record that the cloth was manufactured before 31-7-1943. This was not a point that was raised in the applications in revision made to the learned Judge nor was the point raised in the trial Court. I have been through the records of the various cases. The accused either pleaded guilty or admitted that they knew that the cloth had to be sold before 31-12-1944. It was never suggested by any of them that the cloth was manufactured after 31-7-1943. The Inspector who recovered the cloth was examined as a witness. In one case he said that all cloth manufactured after 31-7-1943, was not issued from the mills unless it was marked according to the rules with what is known as a Tex Mark. In other cases he merely said that the cloth had to be sold before 31-12-1944. There was at least *prima facie* evidence that the cloth could not have been manufactured after 31-7-1943, and no

attempt was made to rebut this evidence even by way of an allegation. There is certainly no reason to interfere in revision upon the ground that there was no positive evidence in each case that the cloth was manufactured before 31-7-1943. On the general evidence the assumption could be made and nobody ever suggested that the cloth was manufactured after 31-7-1943.

[2] In the other cases the learned Judge has suggested that the fines should be reduced to Rs. 5 each. He seems to have been under the impression that the persons found in possession of the cloth had been harshly treated because their shops were raided on 1-1-1945. His idea was that the persons concerned could not have got rid of the cloth which they had not happened to sell the day before. My attention has been drawn to the decision of the Nagpur High Court in A. I. R. 1945 Nag. 249.<sup>1</sup> In so far as the learned Judges have held that persons charged with a contravention of Cl. 14 of the Order should not be convicted for being in possession of cloth against the provisions of the order if they had a lawful excuse for such possession. I agree with them, but in these cases no attempt was made to prove by any evidence that the persons concerned could not have got rid of the cloth if they wanted to do so. There were mere allegations in most of the cases that that was the fact, but no witnesses were called. On the other hand, in so far as the learned Judges of the Nagpur High Court have held that Cl. 15 of the Order to all intents and purposes repealed Cl. 14, I cannot, with the greatest respect, agree with them. I cannot believe that the order intended to say in Cl. 14 that a person should not be in possession of cloth of a certain kind and then in Cl. 15 that he might legally be in possession of it. It seems to me that these clauses read together clearly mean that no person is to be in possession of any kind of cloth unless the Textile Commissioner allows such person to be in possession of cloth of some kind on certain conditions. I do not think that it can be inferred if no conditions are imposed by the Textile Commissioner that a person can be in possession of cloth unconditionally in contravention of the provisions of Cl. 14. I think if the Textile Commissioner imposes conditions, then anybody who complies with the conditions can be in possession of cloth but if no conditions are imposed, then nobody can be in possession of cloth at all. If Cl. 15 was intended to mean that any person could be in possession of cloth but that the Textile Commissioner could impose conditions, then Cl. 14 would be completely superfluous.

[3] The learned Judge has remarked that the pieces of cloth which were found in the shops of the various men concerned in these



cases were of such a kind that there was no great demand for them and he has, therefore, assumed without going into the details in any particular case that the accused really could not dispose of them. This seems to me to be a wide assumption. They were not bound to keep these things till 31-12-1944. If they thought that there was no great demand for cloth of this kind they could have reduced the prices or held an auction or in the last resort have given the things away. That would have been of no great hardship if the things in fact could not be sold. A great deal of the learned Judge's order is directed to a criticism of the order. It is not in my judgment the business of a Court to question the policy of the law. Its business is to enforce the law such as it is. In these cases these men were required not to be in possession of cloth and they were found to be in possession of it. Therefore they were guilty of a contravention of the clause. A good deal of emphasis was laid on the fact that the order did not give any direction for the disposal of the cloth which had not been sold. That is not a matter for the Court. It was enjoined upon the persons accused not to be in possession of cloth and it was their business to discover how they were to dispose of the cloth. The learned Judge seems to have had a good deal of sympathy with the persons accused, but he has perhaps overlooked the fact that these provisions are made for the benefit of the people of the country and undue sympathy with those who contravene the provisions of an order of this nature may lead to considerable inconvenience to the people at large. In my judgment there is no sufficient reason to interfere with the sentences of fine. The learned Magistrate has graded the sentences quite reasonably in consideration of the status of the accused and the nature of the cloth recovered. Rules of this kind are easy to evade and the Courts should enforce the rules with a certain strictness in order to prevent the hoarding of cloth and the sale of it in black markets. I think it would be a pity if cloth dealers were under the impression that any contravention of the rules by them would be treated with leniency.

[4] I may mention that it was suggested that the publication of the Order in the Government Gazette was not a proper publication within the provisions of R. 119 of the rules made under the Defence of India Act, but that question does not arise in these cases because none of the accused persons suggested for a moment that he was not aware of the existence of the order. Most of them admitted that they knew that cloth had to be sold before 31-12-1944. I reject the references.

D.S./D.H.

References rejected.

\*A. I. R. (34) 1947 Allahabad 252 [C.N. 108.]

BENNETT J.

*Ram Gopal—Plaintiff—Appellant v. Dr. Baikunth Nath Sharma—Defendant-Respdt.*

Second Appeal No. 1323 of 1945, Decided on 30-4-1946, from decision of Dist. Judge, Aligarh, D/-28-4-1945.

\*Limitation Act (1908), Art. 10—Starting point — Possession delivered to vendee before registration.

Where physical possession is obtained by the vendee after the execution of the sale deed and before registration, in a suit for pre-emption time runs from the date of the delivery of possession and not from the date of registration: 9 A. I. R. 1922 Nag. 200 and 32 A. I. R. 1945 Pesh. 9, *Not foll.*; *Case law discussed.* [Para 14]

Limitation Act.—('42-Com) Art. 10 N. 11 pt. 2.

*Cases referred :—*

1. ('29) 27 A. L. J. 889 : 16 A. I. R. 1929 All. 549 : 115 I. C. 642, *Bhagwan Singh v. Tassaddug Husain.*
2. ('22) 9 A. I. R. 1922 Nag. 200 : 68 I. C. 715, *Ragho v. Sakharan.*
3. ('45) 32 A. I. R. 1945 Pesh. 9 : 218 I. C. 367, *Mt. Sardar Begam v. Masoom Shah.*
4. ('35) 22 A. I. R. 1935 Lah. 565 : 16 Lah. 735 : 158 I. C. 226 (F. B.), *Lakshmi Chand v. Kesho Ram.*
5. ('41) 28 A. I. R. 1941 Cal. 78 : I. L. R. (1940) 2 Cal. 270 : 193 I. C. 530, *Gobardhan Bar v. Gunadhar Bar.*
6. ('27) 54 I. A. 89 : 14 A. I. R. 1927 P. C. 42 : 50 Mad. 193 : 100 I. C. 105 (P. C.), *Kalyanasundaram Pillai v. Karuppa Mooppanar.*
7. ('28) 15 A. I. R. 1928 P. C. 86 : 52 Bom. 313 : 108 I. C. 367 (P. C.), *Venkat Subba Srinivas v. Subba Rama.*
8. ('16) 14 A. L. J. 382 : 3 A. I. R. 1916 All. 199 : 35 I. C. 347, *Bindheshri v. Somnath Bhadry.*
9. ('26) 13 A. I. R. 1926 All. 549 : 95 I. C. 138, *Gopal Ram v. Lachmi Misir.*
10. ('27) 14 A. I. R. 1927 All. 545 : 50 All. 125 : 103 I. C. 308, *Mahomed Bashir Khan v. Mt. Kulsum Bibi.*
11. ('37) 24 A. I. R. 1937 Nag. 1 : I. L. R. (1937) Nag. 291 : 167 I. C. 48, *Kasturchand v. Mt. Wazir Begam.*

*Shankar Sahai Verma and S. P. Kumar —*  
for Appellant.  
*Gopalji Mehrotra, C. B. Agarwala, Lakshman Sarup and S. Kumar —* for Respondent.

**Judgment.**— This second appeal raises an interesting and important question of limitation in a pre-emption suit. The appellant, Seth Ram Gopal, sued to pre-empt certain specific property sold for Rs. 1600, to the respondent, Dr. B. N. Sharma. The sale deed was executed on 29-3-1943, but for certain reasons, although it was presented for registration shortly afterwards, it was not registered until 10-5-1943. The suit was instituted on 26-4-1944.

[2] Article 10, Limitation Act, provides a period of one year in suits to enforce a right of pre-emption, time running from the date when the purchaser takes under the sale sought to be impeached, physical possession of the whole of the property sold or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered. It has been found by both lower Courts that physical possession was obtained by the vendee immediately after the execution of the sale deed.



[3] The trial Court held, however, that possession was not taken under the sale deed because prior to registration there was no valid sale, possession was taken in anticipation of its being validated by registration, but that would not amount to taking possession under the sale within the meaning of Article 10. The Munsif held accordingly that the date of registration was the starting point of limitation.

[4] In first appeal the District Judge of Aligarh took a different view. He pointed out that under S. 47, Registration Act, a registered document operates from the time from which it would have commenced to operate if no registration had been required or made and not from the time of its registration. Consequently the operation of the sale took effect from 29-3-1943 and the vendee must be held to have obtained actual physical possession under the sale from that date. As a result of this finding he dismissed the suit.

[5] Learned counsel for the plaintiff appellant has stressed the requirement of Art. 10, that possession must be taken under the sale. Sale is shown in S. 4 (10), Agra Pre-emption Act, to be a sale as defined in the Transfer of Property Act. Section 54 of that Act provides that in the case of tangible immovable property of the value of Rs. 100, and upwards, the transfer can be made only by a registered instrument.

[6] With reference to these provisions learned counsel for the appellant cited 27 A. L. J. 889<sup>1</sup> where it was held in a case where no registration had been effected, that there had been no legal sale, and, therefore, no right of pre-emption had accrued. Learned counsel argues from this that no cause of action arises until the sale deed is registered. Two other cases cited, more directly on the point, are A. I. R. 1922 Nag. 200<sup>2</sup> and A. I. R. 1945 Pesh. 9.<sup>3</sup> These cases undoubtedly support the appellant's contention. In the former case it was held that in a pre-emption suit limitation runs from the date of registration and not from the date of execution of the sale deed and the Article applicable is Art. 120. Section 47, Registration Act, it was held, does not apply to the case. The decision in the Peshawar case was to the same effect.

[7] Learned counsel also argued that the intention of Art. 10 was that time should run from the date of registration in all cases where the instrument of sale required registration and that the first part of the Article is confined to cases where registration is not required, that is under S. 54, Transfer of Property Act. Transfer takes effect by delivery of the property where that property is of a value less than Rs. 100. But he did not cite any authority in support of this construction and if the apparent intention behind Art. 10

is borne in mind, it is not, I think, warranted. The intention would appear to be that time should run from the date when any would-be pre-emptor has notice of the sale. Such notice may be given either by delivery of possession or by registration. Where delivery of possession has been given so as to furnish such notice, time should presumably run from the date of delivery. The only doubt arises from the fact that unless and until registration is effected there is no valid sale. On the other hand as soon as the sale deed is registered, it has retrospective effect so as to make the sale valid from the date of the execution of the instrument. The ruling in 27 A. L. J. 889<sup>1</sup> is, therefore, irrelevant because in that case registration was not effected at all.

[8] Other cases cited on behalf of the appellant were A. I. R. 1935 Lah. 565<sup>4</sup> and A. I. R. 1941 Cal. 78.<sup>5</sup> In the former case a Bench of the Lahore High Court held that when a petition is presented alleging that a debtor has committed an act of insolvency by deed registered, the period of limitation prescribed by sub-s. 1 (a) of S. 9 of the Act runs from the date of its registration and not from the date of its execution. But having regard to the terms of Art. 10, Limitation Act, I doubt whether any argument founded on the provisions of the Provincial Insolvency Act has much force. In the Calcutta case a distinction was drawn between the parties to the sale and a third party. It was stated with reference to S. 47, Registration Act, that while it is undoubtedly true that as between the transferor and the transferee a registered document takes effect from the date of execution, as regards a third party the point of time at which the deed is to be effective is when it is registered. The right of pre-emption accrues, therefore, only from the date of the registration and not from the date of execution of the deed. The provisions of Art. 10, Limitation Act, appear, however, to have received little or no consideration in this case.

[9] Two Privy Council decisions have been referred to by the learned counsel for the respondent, 54 I. A. 89<sup>6</sup> and A. I. R. 1928 P. C. 86.<sup>7</sup> In the first case a Hindu executed a deed of gift of part of his immovable property and delivered it to the donee. On the following day he adopted a son. Three days later he registered the deed. The deed of gift was held to be valid against the adopted son. On delivery of the deed to the donee there was an acceptance of the transfer within S. 122, Transfer of Property Act, and thereupon the gift became effectual, subject to its registration. Their Lordships of the Privy Council observed (P. 95) that they were unable to see how the provisions of S. 123, Transfer of Property Act (requiring registration of the gift) can be reconciled with S. 47, Registration Act



except upon the view that, while registration is a necessary solemnity in order to the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither the death, nor the express revocation by the donor, is a ground for refusing registration, if the other conditions are complied with. In this case a third party, namely, the adopted son, was affected and it has been argued that the decision implies that once the registration is effected, the deed must be considered valid for all purposes from the date of execution.

[10] The decision in the other Privy Council case followed the decision in the first case, and also related to a deed of gift.

[11] Three cases of this Court cited on behalf of the respondent are 14 A. L. J. 382,<sup>8</sup> A. I. R. 1926 ALL. 549<sup>9</sup> and A. I. R. 1927 ALL. 545.<sup>10</sup> In the first case the suit was brought by a zamindar for *zar-i-chaharum* and the period of limitation under Art. 120 was 5 years from the date of the sale. The sale deed was executed on 20-1-1909, but was not registered until 29-1-1909, although it was presented for registration on the date of execution. The suit was instituted on 28-1-1915. It was held that the suit was barred by limitation, the right to sue having accrued to the plaintiff from the date of execution. The judgment, which is a short one, shows that the deciding factor in the opinion of the Bench which decided the case, was that S. 47, Registration Act, made the deed effective from the date of execution. This decision seems to me to be very relevant although this suit was not a pre-emption suit. The plaintiff was, as in a pre-emption suit, a third party, namely, the zamindar. The decision also meets an argument which was advanced on behalf of the appellant that registration might conceivably not take place until after the period of limitation, if taken from the date of execution, had expired. That objection would apply just as much to a suit brought by a zamindar for *zar-i-chaharum* as to pre-emption suits. The case in A. I. R. 1926 ALL. 549<sup>9</sup> also supports this view. The suit in the case was a pre-emption suit, but it was held that Art. 120, and not Art. 10, applied because the suit was in respect of a lease and not of a sale. This how-

ever, does not affect the principle which was applied by the Bench, that principle being that although a document, so long as it remains unregistered, is not valid, yet as soon as it has been registered, it takes effect from the date of its execution. When the law has given to a transaction a retrospective effect, it must have that effect. This case appears to me to be direct authority of this Court in favour of the view taken by the lower appellate Court. Again in the last case of 1927 it was held that a transfer sought to be pre-empted would come into force on the date of the deed of sale and not when it was registered in view of S. 47. Although the sale deed is incomplete till the formality of registration has been gone through, once that requirement is fulfilled the sale takes effect from the date of its execution. The Bench which decided this case referred in this connection to the observations of their Lordships in 54 I. A. 89.<sup>6</sup>

[12] It appears to me, therefore, that there is ample authority for the view taken by the lower appellate Court. The only doubt in the matter seems to me to be whether a suit could be instituted prior to registration. If it could not, then in cases where considerable delay in registration accrued, a would-be pre-emptor might be barred by limitation. Learned counsel for the appellant argued that the suit might be brought even before registration in anticipation of registration and I think that this is a possible view. In the present case no such question arises because registration was effected not long after execution and the plaintiff appellant had ample time after registration to bring the suit.

[13] With reference to the Nagpur case, A. I. R. 1922 Nag. 200<sup>2</sup> referred to earlier in this judgment, I may note that in a latter case of the Nagpur High Court, A. I. R. 1937 Nag. 1,<sup>11</sup> the view that owing to the wording of the Transfer of Property Act, a transfer is incomplete until it has been registered was referred to as an exploded view, and the decisions of the Privy Council were regarded as establishing that the alienation is complete when the conveyancing document is completed and is not postponed until the date of registration.

[14] On a consideration of the authorities, therefore, I entertain no doubt that time ran from the date of the delivery of possession and not from the date of registration. The appeal is accordingly dismissed with costs. Leave is granted for a Letters Patent appeal.

V.R.

*Appeal dismissed.*



A.I.R. (34) 1947 Allahabad 255 [C. N. 109.]

PATHAK J.

*Kewal Ram — Defendant — Appellant v. Raj Karan — Plaintiff — Respondent.*

Second Appeal No. 885 of 1943, Decided on 28-3-1946, from decision of Second Civil Judge, Meerut at Muzaffarnagar, D/- 11-1-1943.

U. P. Debt Redemption Act (13 [XIII] of 1940), S. 4—Suit under S. 33, U. P. Agriculturists' Relief Act (27 [XXVII] of 1934)—Applicability of S. 4.

A suit under S. 33, U. P. Agriculturists' Relief Act, which is originally one for account is converted into a suit for recovery of loan as soon as an application with the proper court-fee is made by the defendant. Hence S. 4, Debt Redemption Act, would apply to a suit under S. 33 in a case in which the defendant has made an application for a decree being passed in his favour and on a declaration being made by the defendant in accordance with S. 4 the plaintiff would be debarred from claiming the benefits under the Debt Redemption Act : 32 A. I. R. 1945 All. 271 (F. B.), *Disting.*

[Paras 3 and 4]

*Case referred :—*

1. (45) 1945 A. L. J. 290 : 32 A. I. R. 1945 All. 271 : I. L. : R. (1946) All. 102 : 221 I. C. 488 (F. B.), *Bhagwandas v. Radhey Lal.*

*A. P. Gupta — for Appellant.*

*Jagnandan Lal — for Respondent.*

**Judgment.** — This is a defendant's appeal arising out of a suit under S. 33, U. P. Agriculturists' Relief Act, in respect of a mortgage, dated 16-8-1934, executed by the plaintiff in favour of the defendant for a sum of Rs. 500. The plaintiff claimed the benefit of the Debt Redemption Act (13 [XIII] of 1940). Thereupon the defendant made a declaration under S. 4 of that Act and opposed the prayer of the plaintiff upon the ground that, by reason of that declaration, the Debt Redemption Act was not applicable. An application was also made by the defendant praying that a decree be passed in his favour for such amount as might be found due from the plaintiff.

[2] The trial Court was of the opinion that the suit was not one for recovery of loan and the declaration made by the defendant was not effective. The result was that the plaintiff was given the benefit of the provisions of the Debt Redemption Act and it was declared that nothing was due to the defendant from the plaintiff in respect of the mortgage in suit. Against this decree the defendant appealed. The lower appellate Court affirmed the view taken by the trial Court and dismissed the appeal. According to the lower appellate Court, the application made by the defendant praying that a decree be passed in his favour did not alter the character of the suit, which was one for account; and the suit not being one for recovery of loan, S. 4, Debt Redemption Act, had no application.

[3] The sole question which requires consideration in this appeal is whether S. 4, Debt

Redemption Act, would apply to a suit under S. 33, U. P. Agriculturists' Relief Act, in a case in which the defendant has made an application for a decree being passed in his favour. Section 4, Debt Redemption Act, so far as it is relevant, is as follows :

"4. (1) The provisions of this Act shall not apply to a suit for the recovery of a loan from an agriculturist where the creditor declares in accordance with the provisions of sub-s. (2) that if a decree is passed in his favour either for the whole or part of the claim such decree shall not be executed against the land, agricultural produce or person of such agriculturist. (2) The declaration mentioned in sub-s. (1) shall in the case of a suit pending at the commencement of this Act, be made at any time before the decision of the suit and in the case of a suit instituted after the commencement of this Act, in the plaint . . . ."

The answer to the question propounded above will depend upon the decision of the question whether the present suit is one "for the recovery of a loan" within the meaning of S. 4. It has not been disputed that the transaction in question is a "loan" within the meaning of the Debt Redemption Act. All that is necessary is, therefore, to examine the nature of the suit under S. 33, U. P. Agriculturists' Relief Act. Such a suit is always initiated by a plaintiff filed by an agriculturist debtor. The statute enjoins on the Court to take necessary accounts and to declare the amount payable by the plaintiff to the defendant. In case, the Court finds that the money is payable by the plaintiff to the defendant, the latter is given the power to make an application praying that a decree be passed in his favour, and thereupon it is incumbent upon the Court to pass such a decree. Section 33 (3) prescribes the court-fees payable upon an application which the defendant may file for a decree being passed in his favour. The fee thus prescribed is "the amount, if any, by which the fee which would be payable on a plaint in a suit for the recovery of the loan declared under that sub-section [viz. sub-s. (2)] exceeds the fee already paid by the plaintiff on his plaint, or the fee prescribed by Art. 1 (b) of Sch. 11, Court-fees Act, 1870, whichever is greater." Thus the total amount of fee paid both by the plaintiff and the defendant in a suit under S. 33, where an application of the nature mentioned above has been made by the defendant, would generally be the fee payable on a plaint in a suit for recovery of the loan. In my judgment, the suit, which was originally one for account, is converted into a suit for recovery of loan as soon as an application with the proper court-fee is made by the defendant. In other words, a suit under S. 33 has the potentiality of being converted into one for recovery of loan upon an application made by the defendant.

[4] The application made by the creditor is aimed at obtaining a decree in the same manner



as the plaintiff in an ordinary suit for recovery of loan. Thus the object of the suit under S. 33, Agriculturists' Relief Act, is not merely to take an account of the loan and to declare the sum due from the plaintiff to the defendant, but also to grant a decree for the sum so found in favour of the defendant. In substance and in truth, therefore, such a suit is one for recovery of loan. In my judgment, it possesses all the essential characteristics of a suit for recovery of loan, and to deny that character to a suit under S. 33, Agriculturists' Relief Act, where the defendant has prayed for a decree, would, in my opinion, be ignoring the real nature of the proceedings in such a suit and would be sacrificing the substance to the form. It is manifest that any other view would defeat the object of the Legislature in enacting the provisions of the law which are under consideration. If an ordinary suit for recovery of loan is launched in Court and the creditor makes a declaration under S. 4, Debt Redemption Act, the debtor would be debarred from claiming benefits under that Act. It would be anomalous to hold that the result should be different if a declaration in accordance with S. 4, Debt Redemption Act, is made in a suit under S. 33, Agriculturists' Relief Act, where an application is made by the creditor for a decree being passed in his favour. I do not perceive any difference between a decree passed in favour of a creditor on the basis of a loan in an ordinary suit and a decree passed in his favour in a suit under S. 33, nor is there any essential difference in the nature of the proceedings in the two suits.

[5] Learned counsel for the respondent has placed strong reliance on the Full Bench decision in 1945 A. L. J. 290.<sup>1</sup> In my judgment, the question which falls to be decided in the present appeal did not arise in that case. Although there are some observations with regard to a suit under S. 33, Agriculturists' Relief Act, the question of the nature of the suit, in a case where the defendant files an application for a decree being passed in his favour, did not come in for consideration before the Full Bench; and, in my judgment, that Full Bench decision does not furnish any answer to the question which has arisen in the appeal before me.

[6] Learned counsel for the respondent has also urged that no decree could be passed in favour of the defendant as the transaction in question was a usufructuary mortgage. Learned counsel, however, has not been able to satisfy me that this point was ever raised in the written objections filed on behalf of the plaintiff in the Court of first instance. The plaintiff did not ask for an issue to be framed upon this point in that Court, nor was it raised before the lower appellate Court. The mortgage deed has not been

placed before me and I am not aware of its terms. Learned counsel appearing for the parties state that the mortgage deed is not upon the record. In these circumstances, it is not possible for me to decide this point even if I had allowed it to be raised for the first time in this appeal, and, therefore, I cannot give effect to this contention.

[7] For the reasons indicated above, I allow the appeal, set aside the decrees passed by the Courts below and send back the case to the Court of first instance with the direction that it will pass a decree afresh in the light of the decision in this appeal. The defendant will be entitled to his costs incurred in this Court and in the lower appellate Court from the plaintiff, and the costs already incurred in the trial Court and to be incurred hereafter shall abide the event. Leave for Letters Patent appeal is allowed.

D.H.

*Appeal allowed.*

[C. N. 110]

\* A. I. R. (34) 1947 Allahabad 256

WALI ULLAH AND SINHA JJ.

*Murlidhar and others — Defendants —  
Appellants v. Ram Saran Das and others —  
Plaintiffs — Respondents.*

Second Appeal No. 1346 of 1940, Decided on 18-1-1946,  
from decision of Dist. Judge, Agra, D/- 21-5-1940.

\*Limitation Act (1908), Art. 62 — Money decree in favour of certain persons — Suit by one for recovery of his share of decree realised by others — Circumstances preventing suit — Suspension of limitation — Limitation Act (1908), Ss. 9, 15 and Art. 120.

*L*, one of the holders of a decree for a sum of money transferred his half share in the decree to *S*. The other decree-holders filed a suit against *L* and *S* for specific performance of contract of sale in their favour of *L*'s half share in the decree. The suit was decreed on 2-1-30 as a result of which the other decree-holders were declared to be entitled to the whole amount of the decree which they subsequently realised in execution on 21-7-32. On 2-10-35 the decree for specific performance was reversed in appeal with the result that *S* was declared to be a purchaser of *L*'s half share in the decree. *S* then filed a suit on 18-1-1938 against the other decree holders for recovery of his share in the decretal amount already realised by them :

*Held*, (1) that the suit was governed by Art. 62 and not by Art. 120 the latter being a residuary Article : 26 Cal. 564 (F. B.) and 32 Cal. 527, *Rel. on.* [Para 5]

(2) the amount of the decree having been realised on 21-7-32 by the defendants, they must be considered to have received that amount on that date for the plaintiff's use and therefore time began to run from 21-7-32. The suit was therefore *prima facie* barred by time unless the plaintiff could invoke any general provision of law by which the bar of limitation could be saved.

[Para 5]

(3) Section 15 (1), Limitation Act, was not applicable to the facts of the case. *Case law discussed* ; [Para 7]

(4) the law Courts do recognise 'general principles of suspension of limitation or right of action' in cases where a party is prevented under certain circumstances from taking action in pursuance of his rights. *Case law discussed.* [Para 9]



(5) the plaintiff could not possibly institute a suit for recovery of his share of the decretal amount as the decree for specific performance dated 2-1-30 stood in his way until it was finally reversed on 2-10-35. Though there was no specific order of the Civil Court debarring him from bringing an action till the decision of the High Court dated 2-10-35 the position was that the very basis on which he could claim a moiety share in the decree had been declared to be non-existent at the instance of the defendants themselves. The suit as instituted within three years from the date of reversal of decree on 2-10-35 was therefore within time : 20 A.I.R. 1933 Mad. 418 (F. B.) and 26 A. I. R. 1939 All. 82, *Disting.* [Para 9]

Lim. Act.—('42 Com.) Art. 62, N. 9, Pt. 5, Art. 120, N. 2, Pt. 1, S. 15, N. 6 and 11.

Cases referred :—

1. ('99) 26 Cal. 564 (F. B.), Sharoop Dass Mondal v. Joggessur Roy.
2. ('05) 32 Cal. 527, Mahomed Wahib v. Mahomed Ameer.
3. ('39) 26 A. I. R. 1939 All. 82 : I. L. R. (1939) All. 207 : 180 I. C. 927, Lakhmi Chand v. Bibi Kalsuman-nissa.
4. ('39) 26 A. I. R. 1939 All. 66 : I. L. R. (1939) All. 103 : 180 I. C. 633, Badruddin v. Mahyar Khan.
5. ('27) 14 A. I. R. 1927 Mad. 997 : 105 I. C. 304, Lakshminarayana v. Lakshmi pati.
6. ('33) 20 A. I. R. 1933 Mad. 418 : 56 Mad. 490 : 143 I. C. 1 (F. B.), Tripura Sundaramma v. Abdul Khader.
7. ('32) 19 A. I. R. 1932 P. C. 165 : 60 Cal. 1 : 59 I. A. 283 : 137 I. C. 529 (P. C.), Nagendra Nath v. Suresh Chandra.
8. ('33) 20 A. I. R. 1933 P. C. 52 : 12 Pat. 195 : 60 I. A. 43 : 141 I. C. 760 (P. C.), Kirtyanand Singh v. Pirthi Chand.
9. ('39) 26 A.I.R. 1939 Bom. 1 : I.L.R. 1939 Bom. 173 : 179 I. C. 178, Narayan Jivaji v. Gurunathgouda.
10. ('45) 32 A. I. R. 1945 P. C. 5 : I. L. R. (1945) Kar. P. C. 43 (P. C.), Narayan Jivangouda v. Puttabai.
11. ('44) 31 A.I.R. 1944 All. 88 : I.L.R. (1944) All. 197 : 212 I. C. 621, Chanda Devi v. Nathu Singh.
12. ('21) 19 A. L. J. 26 : 8 A.I.R. 1921 P. C. 31 : 6 Pat. L. J. 132 : 48 I. A. 17 : 59 I. C. 636 (P. C.), Rameshwar Singh v. Homeshwar Singh.
13. ('05) 32 I. A. 102 : 27 All. 334 : 8 Sar. 810 (P. C.), Shaik Kamar-uddin Ahmad v. Jawahir Lal.
14. ('28) 15 A.I.R. 1928 Pat. 86 : 6 Pat. 635 : 102 I. C. 327, Ram Ghulam Singh v. Raj Kumar Rai.
15. ('20) 7 A. I. R. 1920 Mad. 663 : 43 Mad. 845 : 59 I. C. 472, Muthuveerappa Chetty v. Adaikappa Chetty.
16. ('08) 35 Cal. 209 (F. B.), Lakhan Chunder Sen v. Madhusudan Sen.
17. ('68) 12 M. I. A. 244 : 2 Suther 173 : 2 Sar 424 (P. C.), Ranee Surnomoyee v. Shooshee Mokhee Burmonia.
18. ('59) 7 M.I.A. 323 (P. C.), Prannath Roy v. Rookea Begum.
19. (1801) 6 Ves. 73, Pulteney v. Warren.
20. (1837) 11 Bli (N.S.) 158, East India Co. v. Champion.
21. ('16) 43 Cal. 660 : 3 A. I. R. 1916 P. C. 96 : 33 I. C. 452 (P.C.), Nrityamoni Dassi v. Lakhan Chandra Sen.
22. ('30) 17 A. I. R. 1930 Cal. 329 : 57 Cal. 860 : 116 I. C. 268, Ashoy Kumar Roy v. Abdul Kader Khan.

Gopi Nath Kunzru and Din Dayal—for Appellants.  
J. Swarup — for Respondents.

**Wali Ullah J.** — This is an appeal by the defendants against the decree passed by the learned District Judge of Agra confirming the decree passed by the Court of first instance.

[2] The plaintiffs-respondents brought the present suit for recovery of Rs. 3,000 principal, and Rs. 990 interest, and Re. 1-9-0 costs from the defendants and this claim has been decreed by both the Courts below.

[3] The only question which requires consideration in this appeal is whether the suit was barred by limitation. The relevant facts may be briefly set out here. Admittedly a village called Chulhauuli was purchased by the defendants Murlidhar, Joti Prasad and one Ganeshi Lal deceased who was father of Bishambhar Nath defendant, as well as by Lal Kishori Lal defendant 4. The share of Lal Kishori Lal in the property purchased was half. The property purchased, along with some other property, was subject to various incumbrances. The incumbrances on village Chulhauuli were paid off by Murlidhar, Joti Prasad and Ganeshi Lal. Later on Lala Kishori Lal paid his proportionate share of the money spent by Murlidhar and others in discharging the prior incumbrances. On 25-7-1925, Murlidhar, Joti Prasad and Ganeshi Lal deceased filed suit No. 266 of 1925 for contribution against Thakurain Singal Kuar and others in respect of the money spent in clearing off the incumbrances. This suit was decreed for Rs. 6,000 on 16-8-1926. As mentioned above Lal Kishori Lal, defendant 4 in the present suit, held a moiety share and on 16-12-1928, it appears, a sale deed of the half share of Lal Kishori Lal in the decree was executed in favour of Lala Sheobans Rai, father of the plaintiffs Ram Saran Das, Ishwar Saran and Bishambhar Deyal. On 15-4-1929, Joti Prasad, Murlidhar and Ganeshi Lal filed suit No. 57 of 1929 against Lal Kishori Lal and Lala Sheobans Rai seeking specific performance of a contract of sale of the half share of Lal Kishori Lal. On 2-1-1930, the aforesaid suit No. 57 of 1929 was decreed with the result that Joti Prasad, Murlidhar and Ganeshi Lal alone were declared to be entitled to the entire amount of the aforesaid decree against Thakurain Singar Kuer and others. In execution of the aforesaid decree in suit No. 266 of 1925 the property of the judgment-debtors was put to auction and sold on 26-1-1932. On 21-7-1932, Murlidhar, Joti Prasad and Ganeshi Lal realised Rs. 6,000 in full satisfaction of the decree. Meanwhile the decree in suit No. 57 of 1929 was under appeal in the High Court and on 2-10-1935, the High Court reversed the decree of the Court of first instance and dismissed the suit for specific performance with the result that Lal Sheobans Rai, the father of the plaintiffs, was held to be a purchaser of the half share of Lala Kishori Lal in the aforementioned decree in suit No. 266 of 1925. Lala Sheobans Rai died on 19-11-1935. On 18-1-1938, the plaintiffs instituted the present suit



for recovery of Rs. 9991-9-0. The suit was resisted only by defendants 1 to 3 on the grounds: (1) that Lal Kishori Lal had no interest in decree in Suit No. 266 of 1925; (2) that Lala Sheobans Rai was not a bona fide transferee for value of Lal Kishori Lal's share in this decree; (3) that the claim was barred by estoppel; and (4) the claim was barred by limitation. It was further contended that the plaintiffs were not, in any case, entitled to recover any interest. The Court of first instance found on all the issues in favour of the plaintiffs and decreed the claim in its entirety. As mentioned already all these findings recorded by the Court of first instance were affirmed on appeal.

[4] The only point which calls for consideration in this appeal is whether the claim was barred by limitation. On this question both the Courts below were of the opinion that Art. 62, Limitation Act, was applicable to the facts of the present case. They were also of the opinion that S. 15, Limitation Act, was applicable and the suit was, therefore, within time.

[5] Learned counsel for the appellants has strongly contended that the benefit of S. 15, Limitation Act, could not be claimed in this case by the plaintiffs-respondents and therefore the suit was clearly barred by three years' limitation prescribed by Art. 62, Limitation Act. On the facts admitted and found by the Courts below it is quite clear that Art. 62 and not Art. 120, Limitation Act, as was faintly suggested by the other side, was applicable to the facts of the present case. Article 120, as observed by the Full Bench of the Calcutta High Court in 26 Cal. 564,<sup>1</sup> can apply only when the case does not come under one of the many Articles dealing with specific cases. Reference in this connection might also be made to a decision of two learned Judges of the Calcutta High Court in 32 Cal. 527,<sup>2</sup> where the scope of Art. 62, is very fully explained. The only question, however, is whether the provisions of S. 15, are applicable in the circumstances of the present case. The amount of the decree was no doubt realised by the defendants-respondents on 21-7-1932. The amount claimed in the present suit must, therefore, be considered to have been received on that day by the defendant for the plaintiffs' use. Normally, therefore, time will begin to run against the plaintiffs from the 21-7-1932, and unless the benefit of the provisions of S. 15, (1), Limitation Act, be available to them, it is contended by the learned counsel for the appellants, the suit is clearly out of time. Section 15 (1) of the Act runs thus:

"In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or

made, and the day on which it was withdrawn, shall be excluded."

The scope of this section has been discussed in various cases of this Court as well as by their Lordships of the Privy Council to which reference has been made by the learned counsel for the parties in the course of their arguments before us. Learned counsel for the appellants has strongly relied upon a decision of two learned Judges of this Court reported in A. I. R. 1939 ALL. 82.<sup>3</sup> In this case a person obtained a decree for possession of a temple in 1926. Before he could execute his decree by an application for execution a suit was brought by the pujari of the temple who obtained a decree in 1928 declaring the pujari to be the owner of the temple and restraining the decree-holder in the previous suit from taking possession of the temple. This decree was set aside by the High Court in 1931. The decree-holder of the previous suit made an application for execution in 1933. It was held that the decree of 1928 did not operate as an injunction or stay of execution within the meaning of S. 15 and hence the decree of 1926 was time barred in 1933 when the decree-holder made an application for execution. In the course of their judgment their Lordships observed:

"The Courts in India are bound by the specific provisions of the Limitation Act and are not permitted to move outside the ambit of these provisions:"

Again, their Lordships observed:

"It is not permissible to the Court to discover in the provisions of the Limitation Act general principles and to apply those principles to cases which are not specifically provided for by the Act itself. Now it is abundantly clear that S. 15, Limitation Act, does not contemplate the case of one decree being rendered impossible of execution by a subsequent decree in another suit."

Their Lordships deprecated all references to "general principles of suspension of limitation," and expressed their dissent from the view of the law expressed by two other learned Judges of this Court in A. I. R. 1939 ALL. 66.<sup>4</sup>

[6] Next it was contended by the learned counsel for the appellants that the ruling relied upon by the Courts below, namely A. I. R. 1927 Mad. 997,<sup>5</sup> did not lay down correct law. It was urged that this case was not followed in the later Madras case in A. I. R. 1933 Mad. 418,<sup>6</sup> and that it was also expressly dissented from by the learned Judges of this Court in A. I. R. 1939 ALL. 82.<sup>3</sup> Our attention was also invited to the case in A. I. R. 1932 P. C. 165.<sup>7</sup> In that case their Lordships had to consider the import of the expression "where there has been an appeal," in Art. 182. Their Lordships are reported to have observed as follows:

"There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some



extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide."

Again, reference was made to a decision of their Lordships of the Privy Council in A. I. R. 1933 P. C. 52.<sup>8</sup> In that case a receiver appointed in an administration suit was ordered to pay a decree-holder a certain amount half-yearly in respect of his judgment-debt obtained by him against the judgment-debtor in another suit, whose property was the subject-matter in the administration suit. The receiver paid nothing and the decree-holder put in an application in the administration suit asking the receiver either to pay the debt or that he might take an execution against the property in his hands. The Court ordered the decree-holder to wait for some time; but this order was set aside on appeal. Their Lordships had to consider whether the order of the Court directing the decree-holder "to wait for some time" amounted to an order of stay of execution with reference to the provisions of S. 15, Limitation Act. Their Lordships observed :

"It was an order which did not stay execution at all, but simply said that so far as that application in that suit was concerned the appellants were to wait. That seems to their Lordships not to be in any sense within the meaning of the section a stay of the execution by injunction or order."

Learned counsel has also relied upon the case in A. I. R. 1939 Bom. 1<sup>9</sup> where, with reference to S. 15, Limitation Act, two learned Judges of the Bombay High Court held :

"The question whether in a particular case, the plaintiff has been restrained by an injunction or whether there has been any order against his instituting any proceedings, must be a question which must depend upon the actual order or decree made in the case. An order or decree restraining a person from instituting a suit need not be express. It may be either express or implied. So also merely putting a claim and asserting a right, as distinct from receipt of rents or moneys, is not a violation of an order restraining a party from recovering rents or recovering or receiving debts."

On appeal from that decision of the Bombay High Court in the above-mentioned case, their Lordships of the Privy Council in A. I. R. 1945 P. C. 5<sup>10</sup> at p. 7 have observed :

"The question whether in a particular case a party has been restrained by an injunction or order from instituting a suit must always depend for its decision upon the order, or the decree, made in the case. It appears to their Lordships there is nothing in the injunction or in the decree to support the contention that the appellant was prevented from instituting a suit for possession in 1920, or at any time before the expiry of the period of limitation. The various restraints imposed on the appellant by the decree cannot be made to mean by any process of interpretation that he is thereby prevented from instituting a suit for possession for the suit properties."

With reference to the argument advanced on behalf of the appellant before their Lordships

that since the title of the contending parties was involved in this suit it would have been quite futile to institute a suit, their Lordships observed :

"Their Lordships are unable to appreciate this point for the institution of a suit can never be said to be futile, if it would thereby prevent the running of limitation."

[7] Bearing in mind the facts established in the present case and in view of the authorities mentioned above it must be held that the plaintiffs have failed to bring their case within the terms of S. 15, Limitation Act. It would, therefore, follow that the suit would be barred by limitation unless the plaintiffs are able to invoke to their aid some principle or provision of law which may save them from the bar of limitation.

[8] Learned counsel for the respondents, however, contends that there are "general principles of suspension of limitation" which are applicable to cases where a party is prevented under certain circumstances from taking action in pursuance of his rights. His contention is that Courts do recognize and act on these principles. It must, however, be stated at the very outset that there is a good deal of conflict of judicial opinion. As mentioned already, in A. I. R. 1939 ALL. 82,<sup>3</sup> a Bench of two learned Judges of this Court, Thom C. J., and Ganga Nath J., at p. 83 observed as follows :

"We are unable to agree that there is any place in the law of limitation in India for a "general principle of limitation".

Again, at p. 84 they have observed :

"In view of what must be regarded as settled law that the Courts in India are bound by the specific provisions of the Limitation Act and are not permitted to move outside the ambit of these provisions, references to 'general principles of suspension of limitation are to be deprecated'."

On the other hand, two other learned Judges of this Court, Harris and Misra JJ., in A. I. R. 1939 ALL. 66<sup>4</sup> at p. 70 observed as follows :

"It is on the general principles of suspension of limitation which are applied in cases where a party is prevented under certain circumstances from taking action in pursuance of his rights, that the applicants in this case are entitled to exclude the time from 14-2-1921 to 6-2-1935. Courts do recognize and act upon these principles."

It must be observed that in the last mentioned case their Lordships definitely held that S. 15, Limitation Act, was not applicable. Again, two other learned Judges of this Court, Ismail and Mulla JJ., in A. I. R. 1944 ALL. 88,<sup>11</sup> observed with reference to S. 15, Limitation Act, this section in terms did not apply to the facts of the case before them. At p. 89, they, however, went on to observe :

"This section, however, assumes the existence of a decree which is capable of execution. The decrees in the suits in question were declared null and void by Suit No. 90 of 1931 which rendered the two decrees entirely



inoperative. . . . . It is inconceivable that the Legislature ever intended that in these circumstances the decree-holders would be forced to make the applications only to have them dismissed. The law of Limitation would apply only if an operative decree were in existence. If by the order of a competent Court the decree has been rendered a nullity, the period during which that order is in force must be excluded otherwise the period of limitation allowed to the decree-holder would be reduced to less than three years. In our opinion, there is no justification for such a reduction of time for the execution of a decree either in law or equity."

Their Lordships have further referred to the case in 19 A. L. J. 26,<sup>12</sup> decided by their Lordships of the Privy Council in which their Lordships are reported to have observed at p. 30.:

"They are of opinion that, in order to make the provisions of the Limitation Act apply, the decree sought to be enforced must have been in such a form as to render it capable in the circumstances of being enforced. . . . . They are of opinion that when the Limitation Act of 1908 prescribes three years from the date of a decree or order as the period within which it must be enforced, the language, read with its context, refers only, as they have already indicated, to an order or decree made in such a form as to render it capable in the circumstances of being enforced. This interpretation appears to them not only a reasonable one in itself, but to be in accordance with the previously expressed opinion of this Board in 32 I. A. 102 : 27 All. 334.<sup>13</sup>"

Reference was also made to the case in A. I. R. 1928 Pat. 86,<sup>14</sup> where two learned Judges of the Patna High Court held:

"Where a decree-holder is restrained by injunction from executing the decree or *where his decree has ceased to exist* having been set aside in a separate suit, the time of injunction or the period for which the decree ceased to exist should be excluded."

In A. I. R. 1944 ALL. 88<sup>11</sup> their Lordships further observed:

"We, however, find no adequate reason to hold that the period of limitation will keep on running while the decree is not even in existence having been declared null and void by a competent Court. We are aware of the general principle that once the period of limitation has begun to run against a particular right to sue, appeal or apply there is no suspension of that period except as provided by the Limitation Act itself. This principle, however, is subject to modification in special circumstances and has been recognized in A. I. R. 1920 Mad. 663.<sup>15</sup>"

Finally, their Lordships observed at p. 91:

"We have given our serious consideration to the authorities that have been cited before us by the parties and we have no hesitation in holding that the plea of limitation should be repelled in this case. It appears to us wholly unreasonable to hold that the right to execute the decrees became barred because the decrees were rendered incapable of execution by the subsequent decree of a competent Court."

It may be observed here that the case in A. I. R. 1939 ALL. 82<sup>3</sup> was cited before the Bench which decided the case in A. I. R. 1944 ALL. 88<sup>11</sup> and their Lordships with reference to that case observed:

"In that case, it will be noticed that the suit was by a third party and not by the judgment debtor. There was absolutely no declaration with regard to the decree which was obtained by the respondent. The decree, therefore, remained operative and could have been executed by the decree-holder."

Again, in 35 Cal. 209,<sup>16</sup> a Full Bench of the Calcutta High Court affirmed the principle of the suspension of limitation or of right of action. In that case a Hindu, Guru Charan Sen died, intestate in 1872 leaving a widow and three sons. On 18th January 1892 two of his sons were dispossessed of their share in certain property. In 1896 one of these sons instituted a suit against the other two sons for possession and account and in 1897, on the death of the two defendants, their sons were brought on the record. The sons of one of the original defendants supported the claim of the plaintiff. A decree dated 20th April 1903 was passed in favour of the plaintiff and it was further declared that the defendants who supported the claim of the plaintiff were entitled to the share they claimed. On appeal, however, on 22nd February 1904, the decree in favour of the plaintiff was confirmed but so far as it related to the sons of the defendant who supported the claim of the plaintiff, it was set aside. Thereupon on 14th November 1904 these persons instituted a suit for a one third share in the property which had devolved on their father on the death of Guru Charan Sen. It was held by the Full Bench that the right of the plaintiffs to bring an action to recover the property was suspended between 20th April 1903 and 22nd February 1904 and that in consequence the suit was not barred by limitation. At page 218 their Lordships observed:

"We think, therefore, in these circumstances that the right of the plaintiffs to bring an action to recover the property was suspended between 20th April 1903 and 22nd February 1904 and that the case falls within the principle laid down by the Judicial Committee of the Privy Council in the case in 12 M. I. A. 244<sup>17</sup> and in 7 M. I. A. 323<sup>18</sup> at page 357. It is conceded that at the time of the institution of the first suit, the plaintiff's claim was not barred."

In this connection the language of Lord Eldon in (1801) 6 Ves. 731<sup>19</sup> at page 92, has some application: 'If there be a principle, upon which Courts of justice ought to act without scruple, it is this: to relieve parties against that injustice occasioned by its own acts or oversights at the instance of the party, against whom the relief is sought. That proposition is broadly laid down in some of the cases.' This view was approved of by the House of Lords in (1837) 11 Bli. (N. S.) 158.<sup>20</sup>

On appeal their Lordships of the Privy Council affirmed, on the question of limitation, the decision of the Full Bench of the Calcutta High Court: *vide* 43 Cal. 660.<sup>21</sup> At page 663 their Lordships of the Privy Council observed:

"Limitation would no doubt run against them from that time (i. e., 1892). But it would equally without doubt remain in suspense whilst the plaintiffs were *bona fide* litigating for their rights in a Court of Justice."

Reference may also be made to the case in A. I. R. 1930 Cal. 329,<sup>22</sup> where a Bench of two learned Judges of the Calcutta High Court while considering the question of limitation which



would govern an application for execution, are reported to have observed at page 331 :

"There is no provision in the Limitation Act which would extend the period of limitation in such a case. *The general principles* of suspension of limitation might be applied in cases where a plaintiff or a decree-holder is prevented under the circumstances from taking action in pursuance of his rights. The principal case as regards suspension of limitation or rather of the cause of action arising after certain previous proceedings had terminated is that in 12 M. I. A. 244.<sup>17</sup>"

[9] In view of the authorities referred to above, it must be held that law Courts do recognize "general principles of suspension of limitation or right of action" in cases where a party is prevented under certain circumstances from taking action in pursuance of his rights. In the present case the amount of the decree was received by the defendants on 21st July 1932. Prior to that, however, that is, on 2nd January 1930, the defendants had managed to obtain a decree in Suit No. 57 of 1929 wherein they alone had become entitled to the entire amount of the decree in question. Till 2nd October 1935 when the High Court reversed the decision of the learned Civil Judge in Suit No. 57 of 1929, the plaintiffs could not possibly institute the suit for recovery of their share in the decretal amount as the decree of the Court of first instance in Suit No. 57 of 1929 stood in their way. Undoubtedly it is true that there was no specific order of the civil Court debarring them from bringing their action but till the decision of the High Court in appeal given on 2nd October 1935 the position was that the very basis on which they could claim a moiety share in the decree, that is their right by purchase of half the decretal amount of the decree in Suit No. 266 of 1925 had been declared to be non-existent at the instance of the defendants themselves. It is not the case here that by reason of a decree obtained by a third party the impediment in the way of the present plaintiffs was created and in this respect this case is distinguishable from the cases reported in A.I.R. 1933 Mad. 418<sup>6</sup> and A.I.R. 1939 ALL. 82.<sup>3</sup> It must, therefore, be held that the suit as instituted was not barred by time and thus the main contention of the learned counsel for the appellants fails.

[10] Learned counsel for the appellants has next contended that the Courts below were in error in allowing the plaintiffs interest from 21st July 1932 when the money was realised by the defendants. It was contended that interest could be claimed only with effect from the date of the notice of demand, that is, from 18th March 1937. It was also contended by the learned counsel that the defendants appellants were entitled to recover from the plaintiffs respondents a portion of the costs incurred in Suit No. 266 of 1925.

[11] After hearing learned counsel for the parties, I am satisfied that the view taken by the lower appellate Court in regard to both these matters was quite correct.

[12] The result, therefore, is that the appeal fails and I would dismiss it.

**Sinha J.**—I agree.

**By the Court.**—The appeal is dismissed with costs.

K.S.

*Appeal dismissed.*

**A.I.R. (34) 1947 Allahabad 261 [C. N. 111.]**

**BRAUND AND YORKE JJ.**

*Ali Asghar Hasan — Defendant — Appellant v. Farid Uddin Hasan, Plaintiff and another, Defendant — Respondents.*

First Appeal No. 159 of 1941, Decided on 18-2-1946, from decision of Civil Judge, Budaun, D/- 25-2-1941.

(a) Mahomedan law — *Waqf* — Principles of Trusts Act do not apply—*Waqif* constituting himself as first mutwalli can resign from office and appoint another person as his successor—Such appointment will be valid for lifetime of *waqif* and will not enure against express terms of *waqf*—Held on construction of *waqfnama* and deed of relinquishment that appointment of new mutwalli was valid.

The principles of the Trusts Act do not apply to a matter such as a Muhammadan *waqf*, which is governed by the special provisions of the Muhammadan law applicable to it. [Para 23]

There is nothing in the Muhammadan law which prevents the appropriator or *waqif*, who is himself the first mutwalli, from resigning his office, and, out of his own residuary or general powers as *waqif* or appropriator, appointing his own successor provided that thereby he does not oust any express power already conferred by the deed of *waqf*. The appointment cannot, however, enure against the express terms of the *waqf* and must terminate with the life of the *waqif*. This qualification is entirely consistent with the view that, while retaining all his general powers as *waqif* or 'appropriator' to the extent to which he has not parted with them, he cannot in effect revoke or vary the *waqf* he has himself created by exercising them if, and to any extent that, he has assigned them to a third party and that third party is able and willing to exercise them: 3 A. I. R. 1916 Cal. 712 and 17 A. I. R. 1930 All. 169, *Rel. on*; 14 A. I. R. 1927 All. 257 and 37 Cal. 263, *Ref.*

[Paras 21, 22 and 26]

S, a Muhammadan executed in 1915, a *waqf alal aulad* for the benefit of his two wives and two daughters and a son, F from second wife and for the perpetual support of his children and children's children generation after generation. The deed recited as follows: 'I myself will remain the mutwalli of the *waqf* property during my lifetime and I will spend the income of the *waqf* property for my support and the support of my children in a way considered proper by me, but this property will not be sold privately or by public auction in satisfaction of any debt due by me nor shall I have any right to make any sort of transfer.' By cl. 2 the settlor made a provision for the future devolution of the office of mutwalli by saying 'I shall, during my life time appoint any one of male issues as mutwalli and if I fail to do so the eldest of male issues shall be appointed as a mutwalli and after my death every mutwalli shall be empowered to nominate his



successor as mutwalli and if any mutwalli is not nominated then after the death of each mutwalli the eldest of his male issues belonging to my generation shall be appointed as mutwalli. By cl. 3 it was provided that after the death of the settlor Rs. 100 per month were to be paid to each of his two wives provided they had not been divorced by him at the date of his death. Similarly Rs. 100 per month were to be paid to each of his two daughters after his death and a sum of Rs. 300 per month was payable to his son F' after his death. By cl. 4 the settlor made certain charitable dispositions at a cost of Rs. 190 per annum and directed that he himself and after his death the mutwalli for the time being should make these payments.

In 1917 the settlor divorced his second wife and in 1918 the first wife also died. The settlor then married a third wife to whom a son A was born in 1920. The settlor's affections having been transferred from the children of the divorced wife to A, he executed a deed of relinquishment in 1937 by which he purported to resign and discharge himself from the mutwalliship and to appoint A in his place. This deed provided that A should pay Rs. 5 a month to his two daughters and spend Rs. 190 annually on religious purposes as detailed in the *waqf* of 1915 and that the remaining income of the *waqf* property may be appropriated by A as his dues of mutwalliship so long as he remained mutwalli. The other provisions of *waqfnama* were not affected by this deed.

F', then filed a suit against the settlor and A for declaration that since the relinquishment of mutwalliship by the settlor he became the sole mutwalli and manager of the *waqf* property according to the terms of the *waqf* and that the appointment of A as mutwalli was not valid:

*Held* (i) though the settlor had appointed himself as the first mutwalli for the whole of the remainder of his life it did not connote a surrender of his inherent power to retire under the Muhammadan law. There was no express surrender and it would have required far more than a mere appointment of himself as the first mutwalli 'for my life' to amount to an abandonment by him of a power to retire at will; [Para 23]

(ii) as the settlor had not conferred by the *waqfnama* any specific benefits on his wives and children during his life and had retained complete control over the residual income of the property, it was open to the settlor in the exercise of his residual powers as settlor to resign his office and to make an appointment even of a stranger which would be effective for his lifetime. The rule as to devolution of office of mutwalli specified in cl. 2 of the *waqfnama* related only to an appointment to take effect after the death and did not govern any appointment which the settlor may make during his lifetime. Consequently the appointment of A as mutwalli by the deed of 1937 was valid for the lifetime of the settlor; [Para 46]

(iii) as under the *waqfnama* of 1915 the settlor had retained his beneficial interest in the income of the property during his lifetime subject only to the charitable annuities, the deed of relinquishment of 1937 did not adversely affect the beneficial interests of the persons specified in the *waqfnama* which were to take effect only after the lifetime of the settlor. The only person affected by the deed of relinquishment was the settlor himself. Though the payment of Rs. 5 a month to the two daughters and the appropriation of the residuary income by A attached to his mutwalliship were not expressly confined to the settlor's lifetime, they must be similarly limited to the remainder of the lifetime of the settlor so long as A's appointment as mutwalli remained valid. [Para 30]

(b) Mahomedan law — *Waqf* — Principles on which Court administers and protects trust property once within its cognizance apply as much to assets comprised in a Muhammadan *waqf* as to property comprised in any other trust — Court has power to remove mutwalli and appoint new one in his place in a proper case.

It is never beyond the power of the Court in a proceeding before it in which assets held on any form of trust are concerned, to protect those assets for the benefit of the beneficiaries in whatever way is necessary. Although the Trusts Act as such does not apply to a Muhammadan *waqf*, nevertheless the broad principles on which the Court administers and protects property once within its cognizance apply as much to assets comprised in a Muhammadan *waqf* as to any other assets held on trust, and that would extend to a power in a proper case to remove a mutwalli, and to appoint a new mutwalli in his place, since though he is not technically a trustee, a mutwalli unquestionably is a person who stands towards his *waqf* in a relationship of the same character as that of a trustee to his trust. Moreover, the Court for this purpose is one of the modes of appointing a new mutwalli which is recognized by all the text books. [Para 27]

*Cases referred :—*

1. ('10) 37 Cal. 263 : 14 C. W. N. 497 : 3 I. C. 419, Salimullah v. Abulkbair M. Mustafa.
2. ('27) 49 All. 435 : 14 A. I. R. 1927 All. 257 : 99 I. C. 1045, Rugghan Prasad v. Mt. Dhanno.
3. ('30) 52 All. 368 : 17 A. I. R. 1930 All. 169 : 123 I. C. 369, Ghazanfar Husain v. Mt. Ahmadi Bibi.
4. ('16) 20 C. W. N. 605 : 3 A. I. R. 1916 Cal. 712 : 29 I. C. 423, Abdul Ghafoor Khan v. Altaf Hosain.

*Sir Syed Wazir Hasan, Shambhu Prasad and C. S. Saran* — for Appellant.  
*Sir Tej Bahadur Sapru and K. N. Gupta* — for Respondents.

**Braund J.**—This is a first appeal, presented as long ago as the month of April 1941, from a judgment of 25.2.1941 of the Civil Judge of Budaun.

[2] On 28.6.1915 a gentleman named Chaudhri Salah Uddin Hussain (hereinafter called the "settlor") who became defendant 1 to the suit out of which this appeal arises, was minded to make a *waqf* of certain property, including houses, more particularly described in the schedule to the plaint. It suffices to say that this property was and is substantial being of the annual value of something approaching ten thousand rupees a year or eight hundred rupees a month.

[3] The settlor at the date of the *waqf* had two wives, the first Mt. Zahirunnissa and the other Mt. Asghari Begum. By the former he had no children and she died, subsequently to the making of the *waqfnama*, in 1918. By the latter wife, Mt. Asghari Begum, he had three children, all of whom had been born at the date of the *waqfnama*. They were Mt. Nafisunnissa, who was born in 1908, Chaudhri Farid Uddin Husain, the plaintiff in the suit, who was born in 1910, and Mt. Sadrunnissa, who was born in 1912. In 1917, subsequently to the date of the *waqfnama*, the settlor, however, divorced Mt. Asghari Begum.



On divorcing this lady in 1917 the settlor appears to have taken a third wife, namely Mt. Shahzadi Begum, and by her a son was born to him in 1920 who is defendant 2 to this suit, Ali Asghar Husain. The settlor and all his children are still alive. Such, then, was the state of the settlor's family at the date when he created the waqf to which this suit relates and subsequently. As far as I know, he has had no further children. At that point it will be convenient to refer to the waqfnama itself, although the actual language of it will have to be examined later on in this judgment, since much will turn upon it. The settlor began by reciting that he was the owner of the property set out in the schedule to the waqfnama together with the state of his family as it then was. He proclaimed his intention of taking advantage of the Waqf Validating Act (Act 6 [VI] of 1913) to make a settlement

"for the perpetual support of my children and children's children, generation after generation, as well as to make proper arrangement for the fulfilment of some charitable purposes and thus to win the favour of God and his prophet and derive benefit in the next world."

He then concluded the recitals by saying that from the date of the waqfnama his own proprietary possession of the property would be "withdrawn" and that he would "remain in possession thereof as a mutwalli." By cl. 1 of the operative part of the instrument he declared that:

"1. I myself will remain the mutwalli of the waqf property during my lifetime and I will spend the income from the waqf property for my support and for the support of my children and wives and on deeds of charity in a way considered proper by me, but this property will not be sold privately or by public auction in satisfaction of any debt or amount due by me nor shall I have any right to make any sort of transfer."

By cl. 2 the settlor then made provision for the future devolution of the office of mutwalli and he said:

"2. I shall, during my lifetime appoint any one of my male issues as mutwalli of the waqf property and if I fail to do so the eldest of male issues shall be appointed as a mutwalli and after my death every mutwalli shall be empowered to nominate his successor as mutwalli and if any mutwalli is not nominated then after the death of each mutwalli the eldest of his male issues belonging to my generation shall be appointed as mutwalli...."

with a proviso for what was to happen if it should befall that the male issue happened to be insane or should forsake the Mahommadan religion.

[4] Clause 3 of the waqfnama then went on to deal with what may be called the beneficial provisions of the settlement. It will be observed that by cl. 1 the settlor had already reserved for himself the full beneficial interest in the property during the remainder of his own lifetime. By cl. 3 he again affirms that the expenses of the education and support of his children are first to be met out of the income of the waqf property

and that during his own lifetime he would himself apply it for this purpose and in meeting his own personal expenses and in maintaining his wives and relations as he thought proper. He then went on to say what was to happen after his death by providing that:

".... After my death out of the income from the waqf property Rs. 100 would continue to be paid to my first wife, Mt. Zahirunnissa and Rs. 100 to my second wife, Mt. Asghari Begum per mensem provided I do not sever my connexion with my wives aforesaid during my lifetime and they may be living and taking food with me...."

[5] That is a clear provision of a hundred rupees a month after his death for each of the two wives to whom he was married at the date of the waqfnama, provided they survived him and had not at the date of his death been divorced. As regards his daughters, he gave: "... rupees 100 to each of my daughters aforesaid...." meaning the two daughters Mt. Nafisunnissa and Mt. Sadrunnissa.

[6] It is to be assumed, I think, from the context that what he meant by that was that each of these two named daughters was to have a hundred rupees a month each after his death. He then proceeded to make further provision for any further issue he might have by saying that:

"If God willing my wives aforesaid give birth to other issues beside the present issues, each son shall continue to receive Rs. 300 and each daughter Rs. 100 per mensem out of the income from the waqf property...."

[7] Finally, by cl. 4 of the waqfnama he made certain charitable dispositions in the form of Rs. 25 which were to continue to be spent during Ashra Muharramulharam, Rs. 15 for the fateha of the saints, Rs. 50 on the education of Muslim girls, Rs. 50 on the education of Muslim boys and Rs. 50 for the support of the poor and orphans, all such payments to be annual. This amounts to Rs. 190 per annum in all. In conclusion he declared that he himself "and after my death" the mutwalli for the time being should make these payments.

[8] That was the effect of the waqfnama itself. In 1917, as already set out, the settlor divorced Mt. Asghari Begum and married Mt. Shahzadi Begum and in 1918 Mt. Zahirunnissa died. At that point, therefore, it would seem possible that, by reason of his having divorced their mother, the settlor's affections may have become diverted from his three children by her, who in terms were the only objects of the benefactions contained in cl. 3 of the waqfnama. In 1920 the defendant, Ali Asghar Husain, was born.

[9] It is possibly significant that the next step in the history of the matter was that on 25.2.1921 the settlor made an attempt to repudiate the entire waqf by executing what is known as an Ibtalnama or document of repudiation. This was



an attempt to get rid of the settlement altogether, and it was ultimately frustrated only by means of a suit, No. 130 of 1922, which was filed by the three children of Musammât Asghari Begum against (among others) seventy three transferees of various parts of the waqf property to whom the settlor had purported to transfer it subsequently to his own repudiation of the waqf. It is remarkable that this suit dragged on until November 1935 when it was ultimately disposed of so far as the Indian Courts were concerned by a judgment of this Court in appeal by which it was held that the waqf instrument of 1915 was valid deed, that it had been acted upon by the settlor and that the plaintiffs were entitled to a declaration that the ibtalnama or repudiation of 25-2-1921 was ineffective to get rid of it and that it remained binding on the settlor. This judgment actually went in appeal to the Privy Council where it was affirmed in 1944. This comparatively simple litigation, therefore, lasted for no less than twenty three years. The next material event which happened is one which is very relevant to the present proceedings. By what is styled a deed of relinquishment of the 14-5-1937 the settlor purported to resign and discharge himself from the mutwalliship of the waqf of 1915 and to appoint the defendant Chaudhri Ali Asghar Husain, his only son by his wife Musammât Shahzadi Begum, in his place and at the same time he purported to make certain material alterations in the beneficial interests of the waqf. This document is important from the point of view of this appeal. The settlor in it first recites that he had executed a deed of waqf-alalaulad of the 28-6-1915 and that it was still in force and had been declared valid by the judgment of this Court in appeal in 1935. He went on to recite that :

".....Under the waqf aforesaid I was declared to be the mutwalli of the (waqf) property for my life and upto now I am holding the office of mutwalli, but I do not want to remain mutwalli in future and my children are not satisfied with my management and in order to remove me from the mutwalliship they are ready to take legal proceedings. In order to avoid litigation voluntarily and of my own accord relinquish the office of mutwalli and from today resign the office of mutwalli and appoint as mutwalli Chaudhri Ali Asghar Husain. He is from today the mutwalli of the waqf property mentioned in the deed of waqf aforesaid....."

[10] The settlor then went on to make certain material alterations in the terms of the waqf-nama of 1915 by providing that the defendant Ali Asghar Husain, as the new mutwalli, should pay "from the present income of the waqf property" five rupees per mensem to the settlor's daughter Musammât Nafisunnissa and a like amount to his daughter Musammât Sadrunnissa and that, after applying the above mentioned

annual sum of Rs. 190 to the religious and other purposes specified in cl. 4 of the waqf-nama, "he may appropriate the rest of the income from the property, which is at present appropriated by me and is in my possession in my capacity as a mutwalli, as his dues of mutwalliship as long as he remains the mutwalli....."

[11] It has to be remembered that under the waqf-nama itself the settlor, while having constituted himself the mutwalli during his own lifetime, had also, subject to the benefactions of cl. 4, retained his full beneficial interest in the income of the property during his life time. In other words, under cl. 3 of the waqf-nama the beneficial interest of the two wives, should they survive him, and of his two daughters and any other issue he might have by such wives, did not arise until after his death. If, therefore, on its true construction, the effect of the deed of relinquishment of 14-5-1937 was merely to interpose an additional charge on the income of the property of five rupees a month each in favour of the two daughters, without affecting their beneficial interest to take effect after the settlor's death and to bestow an interest in the remainder of the income during the Settlor's life time on Ali Asghar Husain it can be argued that the beneficial interests of the children of Musammât Asghari Begum were not in any way adversely affected by the deed of relinquishment. In the same way it can, and has been, argued that, if it was open to the settlor himself to resign as mutawalli for the remainder of his life and to substitute Ali Asghar Husain in his own place as mutwalli, then, provided such substitution is only for the lifetime of the settlor, no beneficial interests under the waqf-nama are affected except those of the settlor himself. In other words, it is said that until the death of the settlor the only person beneficially interested in the income of the waqf property (subject to the charitable annuities contained in cl. 4) was the settlor himself, inasmuch as the provision during his lifetime for his wives, children and needy relations under cl. 3 of the deed were expressly made discretionary so long as he was alive.

[12] The present suit is the direct outcome of the purported relinquishment of the mutwalliship by the settlor in 1937 and the purported substitution by him of the defendant Ali Asghar Hussain as mutwalli, since it is the mutwalliship that carries the real beneficial interest. The present suit was started on 31-10-1938 claiming a declaration that the plaintiff (that is to say, the settlor's son Farid Uddin Hussain) is the sole mutwalli and the manager of the property settled under the waqf-nama of 28-6-1915 and that neither the settlor nor his son Ali Asghar Husain has any right to the mutwalliship. This is certainly a curious conclusion on which to base



the relief asked for in the plaint. What appears to have been in the mind of the plaintiff, and his advisers who drafted the plaint, was that the settlor had not legal right under the Mahomedan law to relinquish his office as mutawalli under his own waqfnama. If that were so, the logical conclusion would appear to be that the instrument of relinquishment of 14-5-1937 had no effect and the settlor himself would, therefore, have retained the mutawalliship. It is difficult to see how on any footing the plaintiff could set up any right in himself to the mutawalliship. The settlor was, and, is, still alive, and, if his attempted appointment of his son Ali Asghar Hussain failed, it would appear that the settlor himself remained mutawalli. The settlor has never nominated the plaintiff Farid Uddin Husain as a mutawalli and, indeed, under cl. 2 of the waqfnama the settlor had no power of nominating a successor except to take effect after his own death. It is difficult at first sight, therefore, to see on what the plaintiff bases his right to claim the mutawalliship for himself. I shall, however, deal with this aspect of the matter at a later stage of this judgment and I only mention it now so as to make it clear that I am aware of the difficulty that may arise.

[13] The learned Civil Judge of Budaun in his judgment treated the issue of whether the settlor was competent or not to transfer the office of mutawalliship to his son Ali Asghar Husain, and whether in consequence, defendant 2's appointment as mutawalli was valid, as the main issue in the case. He dealt at some length with the previous history of the matter and set out those passages from the judgment of Sir Shah Mohammad Sulaiman, the late Chief Justice of this Court, in the appeal proceedings of 1935 which came to the conclusion that the attempts by the settlor from 1921 onwards to get rid of the settlement were because his affections had been transferred since the date of the waqfnama from the children of Mt. Asghari Begum to his son Ali Asghar Husain and that he desired to benefit the latter at the expense of the former. In the passage from the judgment of the late Sir Shah Sulaiman referred to by the learned Civil Judge the former said :

" . . . . I think the clear conclusion to be drawn from these documents is that Salah Uddin executed the waqfnama of 1915 in order to make provision for his family by Mt. Asghari Begum and for his two wives of that period and for himself as a Sunni could do under Act 6 [VI] of 1913. Later when he divorced one of these wives and married Mt. Shahzadi Begum in 1917, his mind was turned against the plaintiff — that is against Farid Uddin Husain — and he desired to provide for Mt. Shahzadi Begum and her children. He, therefore, in 1921 adopted the method of declaring by the deed of revocation that the waqfnama was fictitious and invalid . . . . ."

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[14] The ultimate conclusion at which the learned Civil Judge arrived seems to have been, after examining the Mahomedan law, first that the settlor had no legal right himself to resign the mutawalliship, and (as he describes it) "thus deprive the plaintiff and the issues of Mt. Asghari Begum and Mt. Tahirunnissa and their children's children and change the scheme, share of beneficiaries and deprive the issues of the first two wives of Salah Uddin and introduce the issues of Mt. Shahzadi Begum, in the waqf of 1915."

It will, of course, be a matter for consideration whether the effect of the resignation by the settlor of his mutawalliship and his purported appointment of Ali Asghar Husain in his place was to oust the beneficial provisions of cl. 3 of the waqfnama. But it is clear that the learned Judge held first that the settlor had as a matter of law right to resign and appoint Ali Asghar Husain as his successor in his lifetime and that, in purporting so to do, he both intended to and did deprive the other beneficiaries of their beneficial interests under the settlement. Having reached that conclusion, he then came to the further conclusion that, since the settlor "says that he does not want to be mutawalli any more . . . . and as he cannot transfer his office of mutawalliship to Ali Asghar Husain and as Ali Asghar Husain cannot be appointed mutawalli because the whole scheme of the waqf would be changed," the plaintiff, Farid Uddin Husain, "automatically" became mutawalli. I can understand, without necessarily accepting the grounds on which the learned Civil Judge came to the conclusion that the settlor could not resign his mutawalliship and appoint a successor in his lifetime. But it is difficult to follow his reasoning when he says that the plaintiff "automatically" steps into the vacant mutawalliship. That however was the conclusion to which the learned Judge came and basing himself on it, he decreed the suit for a declaration that the plaintiff Farid Uddin Husain was the sole mutawalli and manager of the waqf and that neither the settlor nor his son Ali Asghar Husain had any interest in it.

[15] The facts have been set out at some length above, because the issues are not altogether easy to understand. The first issue, however, as the learned Civil Judge rightly apprehended, seems clearly to be whether the settlor had power in May 1937 to resign his own mutawalliship and to appoint his son, Ali Asghar Husain as his successor. If he had, then that is an end of the matter, apart, of course, from any question whether by the same document he had a right to vary, and did vary, the beneficial interests under the settlement. This question involves an examination of the Mahomedan law relating to the power of a settlor



under a waqfnama alalaulad to resign his own mutawalliship during his lifetime and while hale and hearty.

[16] The first work to which our attention has been directed is Baillie's Digest of Mahomedan Law published in 1865, Edn. I, at p. 594\* in which the learned author, discussing the powers of a Superintendent to commit the office of mutawalli to another, observes that :

"... A Superintendent while alive and in good health cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust..."

I shall discuss the significance of the concluding 13 words of this passage in a moment. This is further elaborated in a case in 1909 in the Calcutta High Court before Sir Asutosh Mukerji and Vincent J. in the judgment, in which certain valuable texts are set out and comments made on them. In this case (37 Cal. 263<sup>1</sup>) at p. 277 of the Report there occurs the following :

"It is laid down in the Kunyah :— If the *mutawalli* appointed by the founder says 'I resign my *mutawalliship*' (literally I dismiss myself) this declaration has no effect (and he continues as *mutawalli*) unless the declaration is made in the presence of the founder or the *Cadi*, who would thereupon remove him (*Fatawa Mahdiah*, a collection of decisions by the Grand Mufti of Egypt Sheikh al-Islam Muhammad al-Abbasi, A. D. 1883, Vol. II, p. 575 ; also *Fatawa Alamgiri*, Vol. II, p. 509 line 6).

The view taken in these texts is substantially reproduced by modern text writers. Baillie in his Digest of Mahomedan Law, Vol. I, Edn. 1, p. 594, Edn. 2, p. 604, observes that while a Superintendent, may at death commit his office to another in the same way as an executor may commit his to another, a Superintendent, while alive and in good health, cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust. (1). Amir Ali in his Mohammedan Law, Vol. I, p. 355, observes that should a *mutawalli* in his lifetime and in health appoint another in his place, the appointment will not be lawful and valid unless the *mutawalli* has obtained the *tawliyat* with that condition in a general manner. He then quotes a passage from the Raddul Muhtar, Vol. III, p. 337, to explain the meaning of the term 'general'. The term signifies that the *mutawalli* at the time of his appointment was such as should receive the power of transferring the trust to another and substituting that other in his own place. It is worthy of note that the prohibition against the transfer of the trust applies to the appointment of a permanent and substantive successor who occupies the position and exercises the full powers of the *mutawalli*, in fact succeeds him in the office and not merely acts as his temporary substitute in his place. In other words, the renunciation by a *mutawalli* of his office is entirely distinct from his determination to act by a deputy. To the same effect is the statement by Sir Rowland Wilson in his Anglo-Mahomedan Law, Ed. 3, Ss. 328 and 329."

[17] The passage referred to above as laid down in the Kunyah appears on the face of it to refer to a case of a "mutawalli appointed by the founder" in the sense of a mutawalli *other than himself* appointed by the waqif, since it could hardly refer to a declaration to be made "in the

presence of the founder or the Cadi," unless it was dealing with a case in which the founder was not himself the mutawalli nor would the text from the Kunyah necessarily preclude the possibility, in the case of a founder who is himself the first mutawalli, being deemed on resignation to do so with his own consent, which, indeed, is much the same thing as tracing back the power of resignation and of reappointment to the general residuary power remaining in the waqif. But, in my view, this passage from the Kunyah cannot be taken as dealing with a case such as we have before us here in which the waqif himself is the mutawalli. Both the reference to Baillie's Digest of Mohammedan Law, which I have referred to above, and the subsequent reference to the passage from the Right Hon'ble Sir Syed Ameer Ali's Mohammedan Law referred to later seem to exclude cases in which a mutawalli resigns and makes a new appointment in his own place out of some general power of appointment such as that which resides in the waqif himself. The passage at p. 454 of Edn. 4 of Sir Syed Ameer Ali's work on Mohammedan Law says:

"The mutawalli cannot, however, assign or transfer the office to any one, or appoint another during his lifetime, unless his own powers are 'general'. Should he in his lifetime and in health appoint another in his place, the appointment will not be lawful and valid, unless the mutawalli has obtained the *tawliyat* with that condition, 'in a general manner.' In that case the mutawalli so appointing another person in his place will not be able to remove the latter unless the wakif, whilst confiding the trust empowered him to assign the same to another, and also to remove the trustee."

[18] This clearly refers to a case in which the mutawalli is not the waqif himself and it equally clearly implies that even a mutawalli who is not the waqif himself will have the power in his lifetime and in health of appointing a successor, if he has those general powers which the waqif is capable of transmitting to him by express appointment. There are other passages in Sir Ameer Ali's work which point in the same direction. At p. 441 he quotes the *Sahib-ul-Hedaya* (the author of the *Hedaya*) as saying:

"..... The wakif is primarily entitled to appoint a mutawalli for the management of the trust. If he is honest and just, he has a title superior to that of the Kazi to nominate a trustee, for though he has parted with the property, and his right in it has become extinguished, still he has a right to see that its proceeds are applied according to the terms of the consecration."

[19] This would seem to point to an inherent or general power in the founder of the trust and again, in quoting from the *Radd-ul-Muhtar* at p. 442 he says :

".... It is lawful for the waqif to reserve the *tawliyat* (the governance of the trust) for himself. And where a waqf has been created, but the waqif has appointed no trustee or mutawalli for the administration of the waqf, nor has expressly reserved the *tawliyat* for himself, the office would nevertheless appertain to him qua waqif."

\* Second Edition page 604.



[20] This again would seem to point to an inherent residuary or general power in the waqf himself. The Rt. Hon'ble Syed Ameer Ali at p. 447 of the 4th Edn. of his book says that "... the power of appointing a mutawalli rests primarily with the waqf ..." The meaning of the term "general" in reference to the appointment of a mutawalli is explained in the *Anfasa-ul-Wasail* as being

"that the waqf appoints a mutawalli and places him in his own place and constitutes him his successor and authorises him to assign the trust to whomsoever he likes, in such a case the mutawalli can transfer the trust either in health or death illness." (See Ameer Ali, Edn. 4, page 456.)

It would seem, therefore, to be beyond doubt that the waqf, as the primary repository of the general powers of appointment has power to confer on a mutawalli the right of appointing a successor to himself even in health. If that is so, there would appear to be at least as good reason why, in a case in which the waqf has retained the mutawalliship in his own hands, he should have power himself to do that which he undoubtedly could have conferred on a third party the right to do namely to appoint a successor in health. I can see no logical reason why the waqf should have less power to do himself something that he could confer on a third party the right to do. It is quite consistent with this principle of the founder of the waqf possessing an ultimate residuary general power of regulating the mutawalliship that in a case in which he has transferred a general power of appointment to a mutawalli and that power fails, the power of appointment reverts to the founder or his executor, if the founder is dead (49 ALL. 435.<sup>2</sup>) This too seems to point to the possession by the preceptor of at least as great a general power of regulating the succession to the mutawalliship (including power to resign in health and to appoint a successor) in a case in which he is himself the first mutawalli, as he could transmit to a third party in a case in which he is not the first mutawalli. There is a passage in the judgment of a later case in our own High Court which certainly has the appearance of going the whole length of the proposition that the founder of a waqf, who is himself the mutawalli, can appoint his own successor while in health, though it does not in terms go to the length of saying that, he can himself retire and instal such successor immediately. But it is fully consistent with the reasoning that the founder of the waqf should possess such a power. In this case (52 ALL. 368<sup>3</sup> at p. 375) Sen and Niamat Ullah JJ. say that :

"Under the Muhammadan law, a mutawalli who is not the founder of the trust has no power whilst in health to appoint a successor or to formulate any scheme for the succession to the office of the mutawalli.

This restriction does not apply to the founder of the waqf, who in reason and equity ought to have a free hand in the matter of nominating and appointing a mutawalli for the administration of the trust in *præ-senti* ...."

[21] The last case to which I propose to refer is that of 20 C. W. N. 605<sup>4</sup> which is a direct authority of two of the learned Judges of the Calcutta High Court that a mutawalli, who is himself the "appropriator" can renounce the mutawalliship and appoint another person in his place. They say :

"It is said that a mutawalli cannot renounce and appoint another mutawalli. That may be so in respect of a mutawalli who is not himself the appropriator. Atibunnessa in the *towliatnama* of 1894, expressly says that she was acting in her double capacity. She renounced in her capacity of mutawalli but appointed Ghafoor in her capacity of the waqf. It is laid down in the *Kunyah* : 'If the mutawalli appointed by the founder says, I resign my mutawalliship' this declaration has no effect unless the declaration is made in the presence of the founder or the Cadi, who would thereupon remove him : *Fatwa Mahdiya*, Vol. II, p. 575 quoted in 14 C. W. N. 497 at p. 504 : 37 Cal. 263.<sup>1</sup> Here the founder herself made the renouncement to herself and made the appointment herself; such an appointment by the founder is quite distinguishable from an appointment by one mutawalli of another without the intervention of the founder or the Cadi. This appointment, however, cannot enure against the express terms of the original deed of waqf, and must terminate with the life of waqf."

[22] The concluding qualification is, of course, important and is itself entirely consistent with the view that, while retaining all his general powers as waqif or "appropriator" to the extent to which he has not parted with them, he cannot in effect revoke or vary the wakf he has himself created by exercising them if, and to any extent that, he has assigned them to a third party and that third party is able and willing to exercise them. This principle will have some bearing on the result of the appeal when we come to consider what the effect of the purported appointment by the settlor of Ali Asghar Hussain on this case may have been.

[23] There are two arguments advanced by Sir Tej Bahadur Sapru which remain to be noticed against the view that the settlor could relinquish his own mutawalliship during his lifetime and appoint an immediate successor in his own place. The first is that such a course is said to be opposed to the whole principle of the Indian Trusts Act which, unlike the English Trusts Act, does not leave it open to a trustee to retire at will. This may well be true, but the answer must be that the principles of the Trusts Act do not apply to a matter such as a Muhammadan waqf, which is governed by the special provisions of Muhammadan law applicable to it. The other argument advanced by Sir Tej Bahadur Sapru is that by the terms of the waqfnama itself in this case, the settlor has expressly appointed himself as mutawalli for the whole of the



remainder of his own life and has, therefore, released and surrendered any residuary or general power of retirement and reappointment he might otherwise have had. Even if, on a true construction of the waqfnama, the settlor has appointed himself for the whole of the remainder of his life, I do not see why that should connote a surrender of his inherent power to retire, assuming he has that power. There is certainly no express surrender, and, in my view, it would require far more than a mere appointment of himself as the first mutawalli "for my life" to amount to an abandonment by him of a power to retire (assuming he has such power) at will. It may have been, and probably was, the settlor's intention when he made the waqf, to manage it as mutawalli as long as he lived. But a right to "retire" necessarily implies the possibility of a change of mind, or at least an option to interrupt an existing state of affairs.

[24] In the later text books also there is support for the view that a waqif who appoints himself the mutawalli retains an inherent power to regulate the management of the waqf by resigning and transferring his office to another. In the 3rd Edition of Tyabji's *Mohammadan Law* at p. 626, the learned author sets out a series of propositions:

"494. The wakif cannot lawfully remove the mutawalli unless in the dedication he has empowered himself so to do.

"495. The mutawalli has no authority to discharge himself from his office, unless permitted by the wakif or Court.

495 A. The mutawalli has no authority during his lifetime to transfer his office to another.

495 B. The wakif or his executor on appointing himself as the mutawalli, or acting as such, retains the power of transferring the office to another under Ss. 492, 495."

[25] Paragraph 495B above fully recognizes the power of a waqif who is himself the mutawalli to "*transfer the office to another*" not, merely, be it observed, to appoint a deputy; and by para. 492 the general power of appointment inherent in the waqif is placed first in the catalogue of the means by which a mutawalli should be appointed. This view also appears to be shared by Sir Dinshaw Mulla (*Principles of Mohammadan Law*, Edn. 12 p. 178) who says that

"If any person appointed as mutawalli dies, or *refuses to act in the trust*. . . . or if the office of mutawalli otherwise becomes vacant and there is no provision in the waqf deed regarding succession to the office, a new mutawalli may be appointed,"

and first again in the catalogue of persons who may appoint he places the founder of the waqf himself. I cannot see why, on the principles which I have been able to deduce from the texts, when the waqif is himself the first mutawalli, he should not appoint a successor if a vacancy arises, not provided for by the deed of waqf,

when he himself refuses to act further in the trust.

[26] From the foregoing slight examination of the Mohammadan texts and the authorities, so far as they have been brought to our notice, I have reached the conclusion that there is nothing in Mohammadan law which prevents the appropriator or waqif, who is himself the first mutawalli, from resigning his office, and, out of his own residuary or general powers as waqif or appropriator, appointing his own successor provided that thereby he does not oust any express power already conferred by the deed of waqf. In my judgment, therefore, there is nothing in the general provisions of Mohammadan law to prevent the deed of relinquishment of 14-5-1937, in so far as it is a resignation of his office by the settlor and the appointment of Ali Asghar Husain as his successor, from taking effect to the extent aforesaid.

[27] But that does not end the matter, since certain further considerations have been raised with which I must now deal. This branch of Sir Tej Bahadur Sapru's argument runs in this way. It can be put shortly. He bases it on the assertion that it is proved from the facts of the case, and particularly from the findings of this Court in the earlier appeal, that the settlor has acted, if not fraudulently, at least in a manner from which it is plain that he seeks to consult his own wishes and interests rather than the interests of the trust. In the first place he sought unsuccessfully to repudiate his own waqf for no other reason than because he had transferred his affections from one set of members of his family to another. Now, it is said, he seeks by the instrument of 14-5-1937 to accomplish the same thing in a new way and to benefit the defendant Ali Asghar Husain at the expense of the proper beneficiaries under the trust. I confess that I have found this argument attractive. Sir Tej Bahadur Sapru has drawn our attention to a recent Full Bench case in this Court, I.L.R. (1945) ALL. 818,\* in which Wali Ullah J., and I took the view that, in case in which assets were once within the administration of this Court, in the sense that this Court was seized of the administrations of trust assets by having before it proceedings concerning their management, it had, not only the power, but the duty of doing everything necessary by way of administration to protect those assets. That case also was a case concerning a Mohammadan waqf, though it arose in somewhat different circumstances from the present circumstances. I am glad to have the opportunity of repeating that in my opinion it is never beyond the power of the Court, in a proceeding before it in which assets held on any

\* See (45) 32 A.I.R. 1945 All. 261 : I.L.R. (1945) All. 818 : 221 I.C. 515 (F.B.), Md. Ali v. Ahmad Ali.



form of trust are concerned, to protect those assets for the benefit of the beneficiaries in whatever way is necessary. Although I freely accept it that the Indian Trusts Act as such does not apply to a Mohammadan waqf, nevertheless in my opinion the broad principles on which the Court administers and protects property once within its cognizance apply as much to assets comprised in a Mohammadan waqf as to any other assets held on trust. And in my judgment that would extend to a power in a proper case to remove a mutawalli, and to appoint a new mutawalli in his place, since, though he is not technically a trustee, a mutawalli unquestionably is a person who stands towards his waqf in a relationship of the same character as that of a trustee to his trust. Moreover, the Court for this purpose is one of the modes of appointing a new mutawalli which is recognized by all the text books.

[28] If, therefore, I was satisfied that it were necessary for the Court to intervene in these proceedings for the purpose of preserving the property and income comprised in the waqfnama with which we are here dealing from something in the nature of a fraud, I should not, notwithstanding the technical validity of the instrument of 14.5.1937, have shrunk from disregarding it and, if necessary, appointing a new mutawalli, who might, or might not, be the plaintiff, Chaudhri Farid Uddin Husain. That is the course which Sir Tej Bahadur Sapru says is the proper course, and, indeed, it is, I think, the only ground on which he can establish a footing for the plaintiff. It is, of course, a considerable departure from the plaint, which does not ask that the plaintiff should be appointed a mutawalli in the place of the settlor, but seeks a declaration that he "is the sole mutawalli and manager of the waqf." As actually framed, I think, the suit would be bound to fail for the reasons I have already given; but I am not prepared on that account to exclude from consideration the point now taken by Sir Tej Bahadur Sapru, since, as explained above, it is in my view the duty of the Court, now that it is seized of this matter to consider the future administration of the waqf.

[29] I do not doubt that the proceedings of the settlor in this matter leave a good deal to be desired and that he did in fact repent of his original benefaction in favour of the children of Mt. Asghari Begum and endeavoured to transfer it to Ali Asghar Husain, the child of his third wife. But I have to consider whether this by itself constitutes such a fraud on the trust as to disqualify the settlor from nominating a successor on his own retirement or, in the alternative, to disqualify Ali Asghar Husain from being the

mutawalli. It is said that the relinquishment of 14.5.1937 goes further than the mere retirement of the settlor and the appointment of a new mutawalli and that it is sought to vary the beneficial trusts at the expense of the old beneficiaries for the benefit of the new ones. Its provisions in this respect are as follows :

"..... He, 'i. e. Ali Asghar Husain, the new mutawalli,' is from today the mutawalli of the waqf property ..... It shall be incumbent upon the mutawalli aforesaid to pay from the present income of the waqf property Rs. 5 per month to Mt. Nafisunnissa daughter, Rs. 5 per month to Sadrunnissa ..... and to spend Rs. 190 annually on religious purposes as detailed in the deed of waqf and he may appropriate the rest of the income from the property, which is at present appropriated by me and is in my possession in my capacity as mutawalli, as his dues of mutawalliship as long as he remains the mutawalli. ...."

[30] So far as the charitable annuities are concerned, they remain exactly the same as before. The only difference seems to be that monthly payments of five rupees to each of the two daughters are inserted, while the beneficial interest in the residue of the income, "which is at present appropriated by me and is in my possession in my capacity as a mutawalli", is to be retained by Ali Asghar Husain instead of by the settlor himself. As regards the daughters, if my construction of cl. 3 of the original waqfnama of 1915 is right, the daughters were to have a hundred rupees a month each after his death. As far as I can see, this has not been revoked by the document of 1937 and what has really happened is that he has added to that a payment of five rupees a month during his lifetime. In the same way the provision for his wives does not appear to be affected. I have difficulty, therefore, in seeing that, so far as the daughters and wives are concerned, the attempted provisions of the document of 1937 adversely affect them. Indeed, they are beneficial to them. As regards the position during the settlor's own lifetime as I have already pointed out, by the original waqfnama he expressly reserved to himself a power of disposing of the surplus income at his own discretion. By cl. 1 he said that he would "spend the income from the waqf property for my support and for the support of my children and wives and on deeds of charity in any way considered proper by me. ...."

By cl. 3 he expressly said :

"..... During my lifetime I shall spend money on these things (the expenses of the education and support of his children) in a way I think proper and I shall continue to meet my personal expenses with the same income along therewith. .... ;"

and it was only after his death that he gave the legacies to his wives and children specified in cl. 3. It appears to me, therefore, that the settlor under the original waqfnama had retained his beneficial interest in the income of the property during his lifetime, subject only to the charitable



annuities. Reverting again to the document of 14th May 1937, it appears on this construction, at any rate during the settlor's lifetime, to affect adversely no one but the settlor himself. It is quite true that the annuities of five rupees a month to the two daughters and the appropriation of the residuary income by Ali Asghar Husain are not expressly confined to the settlor's lifetime. But, on the reasoning of the earlier part of this judgment and accepting with respect, as I do, the authority of the learned Judges of the Calcutta High Court in 20 C. W. N. 605<sup>4</sup> to the effect that the appointment of a new mutawalli on the resignation of the old one can only take effect subject to the express terms of the original deed of waqf. I am bound to conclude that the appointment of Ali Asghar Husain as mutawalli, if it is valid at all, can only be valid for the remainder of the lifetime of the settlor. In the same way, I must conclude that the beneficial provision for the appropriation by him of the surplus of the income of the waqf property attached to his mutawalliship must be similarly limited. On general principles, I can see no reason why an excessive exercise of his powers by the settlor should not be given effect to the extent to which they are actually within his powers, although the settlor may have gone beyond that point, unless, of course, there is some other overriding reasons such as fraud affecting them.

[31] Our attention has been drawn to nothing in this case indicating any personal disqualification of the defendant Ali Asghar Husain from being a mutawalli, unless it be that he is his father's now favourite son. I feel, however, that that by itself would be too slender a ground to enable us to carry out what otherwise appears to be a quite valid appointment by the settlor. I do not say that there are no grounds for anxiety. But there would have to be a little more than that, before in my judgment, we could intervene to use the powers of this Court to protect the property. This would not, of course, prevent any beneficiary or other person interested from taking the proper steps in the event of their being able to assert and prove any actual breach of trust or any positive jeopardy to the property. But at present there is nothing in this record which enables me to say that it exists.

[32] The case has not been an altogether easy one. But, on the best consideration I have been able to give it, I have come to the conclusion, differing from that of the learned Judge in the lower Court, that it does not automatically follow from what has happened that the plaintiff should now be appointed the mutawalli, and still less that he had actually become the mutawalli. For these reasons I see no other course

open but to allow the appeal and to substitute for the decree of the lower Court an order that the suit be dismissed with costs in both Courts.

[33] *Yorke J.* — This is a defendant's first appeal by one Ali Asghar Husain in a suit for declaration that the plaintiff Farid Uddin Husain alias Farrukh Mian is the sole mutawalli and manager of the waqf alalaulad executed by defendant 1 Salah Uddin Husain father of the plaintiff and of defendant 2 appellant on 28th June 1915, and that the defendants have no right in any form to the mutawalliship of the waqf aforesaid.

[34] The circumstances out of which the suit has arisen are as follows: On 28th June 1915 defendant 1 Salah Uddin Husain executed a deed of alalaulad for the benefit of certain named persons, his two wives Mt. Tahir-un-nissa and Mt. Asghari Begum and his children by those wives, providing further for the benefit of any other issues to which the wives aforesaid might give birth. His children at that date were one son, Farid Uddin, and two daughters Nafis-un-nissa and Sadr-un-nisa. By this deed he appointed himself the first mutawalli in respect of the waqf property. Thereafter Salah Uddin committed numerous acts inconsistent with the deed of waqf and as it appears, he transferred some of the waqf properties to different persons by means of mortgages and sales. It further appears that in 1917 he divorced his wife Mt. Asghari Begum and married in the same year Mt. Shahzadi Begum the mother of Ali Asghar. In the year 1918 the second wife Mt. Tahir-un-nissa died and in the year 1920 the defendant Ali Asghar was born. In 1921 Salah Uddin made a further attempt to rid himself of the effects of his having executed the waqfnama by executing a document described as an ibtalnama by which he repudiated the waqf. It was in consequence of these transfers and the execution of this document that Farid Uddin and his two sisters instituted in August 1922 a Civil Suit No. 130 of 1922 to have the waqf declared valid and to recover from no less than 74 transferees different items of the waqf property. Salah Uddin was impleaded as defendant 2 and Ali Asghar as defendant 70 of this suit. The suit was dismissed by the District Judge of Budaun but in appeal, First Appeal No. 201 of 1930, decided on 21st November 1935, this Court upheld the deed of waqf and decreed the plaintiffs' suit for the declaration sought by them. It is said that some of the transferee creditors took the matter to the Privy Council but were unsuccessful there.

[35] On 14th May 1937 Salah Uddin executed the document which has given rise to the present suit. This is a document described as a deed of relinquishment. In this deed the waqif or settlor



Salah Uddin mentioned that the waqf was still in force and had been declared valid by the High Court in Appeal No. 201 of 1930. He went on to say that by the deed of waqf he was declared to be the mutawalli of the waqf property for his life and that up till now he had been holding that office, but that he did not want to continue as mutawalli in future and that his children were not satisfied with his management and were ready to take legal proceedings for his removal from the office. He went on to say :

"In order to avoid litigation I voluntarily and of my own accord relinquish the office of mutawalli and from today resign the office of mutawalli and appoint as mutawalli Chaudhary Ali Asghar Husain alias Munna Mian my minor son, who is under the guardianship of Mt. Manzoor-un-nissa, own grand-mother (of the minor aforesaid). He is from today the mutawalli of the waqf property mentioned in the deed of waqf aforesaid. It shall be incumbent upon the mutawalli aforesaid to pay from the present income of the waqf property Rs. 5 per month to Mt. Nafis-un-nisa daughter, Rs. 5 per month to Sadr-un-nisa alias Kamni daughter and to spend Rs. 190 annually on religious purposes as detailed in the deed of waqf and he may appropriate the rest of the income from the property, which is at present appropriated by me and is in my possession in my capacity as a mutawalli, as his dues of mutawalliship, as long as he remains the mutawalli."

On the face of it the effect of this document would be that Ali Asghar would be the mutawalli for his lifetime and would be entitled in that capacity to appropriate the whole of the annual income apart from Rs. 310 as his "official remuneration" with the possible result that the provisions in para. 3 of the waqfnama whereby after the waqif's death each son of the two original wives was to receive Rs. 300 per month and each daughter Rs. 100 per month from the income of the waqf property would be rendered ineffective.

[36] The present suit was filed on 31-10-1938. The plaintiff contended that Salah Uddin had no right to appoint any mutawalli outside the circle of beneficiaries described in para. 3 of the waqfnama, that Salah Uddin had relinquished the office of mutawalli and had legally no concern now left with the office or with the waqf property, and that since the relinquishment the plaintiff as the eldest son of defendant 1 and Mt. Asghari Begum, had become the sole mutawalli and manager of the waqf property according to the terms of the deed of waqf. He sought a declaration to that effect. In this connection he relied on para. 2 of the deed of waqf which provides as follows :

"I shall, during my life time appoint any one of my male issues as mutawalli of the waqf property and if I fail to do so the eldest of male issues shall be appointed as a mutawalli, and after my death every mutawalli shall be empowered to nominate his successor as mutawalli and if any mutawalli is not nominated then after

the death of each mutawalli the eldest of his male issues shall be appointed as a mutawalli etc."

The suit was not defended by Salah Uddin but a written statement was filed on behalf of Ali Asghar on 11-1-1940 in which the execution and validity of the waqfnama were admitted. In para. 6 of the additional pleas, however, it was said that defendant 1 Salah Uddin was not a mere mutawalli but he had also the due capacity of the waqif and as such he could transfer the right of mutawalliship (that is the office of mutawalli) and that he had lawfully and legally transferred the office in favour of the contesting defendant Ali Asghar by the document of 14-5-1937. Therefore it was said that "the contesting defendant is now the legal and lawful mutawalli of the waqf property according to the present law and the plaintiff cannot object to it." It was further said in para. 7 that the plaintiff had no right to object to the transfer of mutawalliship during the life-time of defendant 1 Salah Uddin

[37] Upon these pleadings a number of issues were framed but we are concerned only with issues 4, 5 and 6. These issues were as follows:

"4. Was defendant 1 incompetent to transfer the office of mutawalli to defendant 2 under the terms of the waqf deed dated 28-6-1915 and is the appointment of defendant 2 as mutawalli of the waqf property in suit invalid?

5. Has the plaintiff a cause of action to institute the suit?

6. Is the plaintiff entitled to the office of mutawalli of the waqf property during the life-time of defendant 1? If not, what is its effect?"

[38] The learned Civil Judge of Budaun treated issue 4 as the main issue in the case. He discussed the previous history of the waqf and of defendant 1 Salah Uddin and the terms of the waqfnama and the law in regard to the power of a mutawalli to relinquish his office. He concluded that the waqfnama was created for the benefit of the then two wives Tabir-un-nisa and Asghari Begum and their children and children's children. He held that under the deed the eldest male issue of Mt. Asghari Begum would be the next mutawalli after the waqif mutawalli. On these findings he held that by no stretch of imagination or interpretation could Ali Asghar be a mutawalli or a beneficiary. He went on to hold that by the execution of the deed of relinquishment of 14-5-1937 Ali Asghar was appointed mutawalli and could himself appoint a mutawalli and thus the plaintiff Farid Uddin could be completely debarred and all the future sons of Farid Uddin and the sons' sons of Farid Uddin would be deprived of the waqf benefit totally. He went on to say further that as Salah Uddin had vacated his office of mutawalli and had said that he did not want to be mutawalli any more from 14-5-1937



and as he could not transfer his office of mutawalliship to Ali Asghar and as he had a right to resign that office at any time and as Ali Asghar could not be appointed a mutawalli because the whole scheme of the waqf would be changed, the plaintiff automatically became the mutawalli. Further on he said that as Salah Uddin was hale and hearty and was not suffering from death illness and as he had resigned from the mutawalliship, "the next mutawalli is the plaintiff automatically as he is the eldest son as noted in the deed, as Salah Uddin would be deemed to have died without appointing a mutawalli." Hence he held that the appointment of Ali Asghar was totally invalid. He accordingly found on issue 6 that the plaintiff was entitled to the office of mutawalli and that by reason of the execution of the deed of relinquishment on 14-5-1937 which was calculated to deprive the plaintiff of his right he had a cause of action to institute the suit. He accordingly granted the declaration sought by the plaintiff; hence the present appeal.

[39] The first question which arises on this appeal is whether the waqfnama gives any power of appointment on resignation of the settlor and, failing the waqfnama, whether a settlor mutawalli has under the Mohammedan law such a power to resign his office and make an appointment of another person as mutawalli in his place. On an examination of the waqfnama, it is clear that there is certainly no provision for resignation by the waqif Salah Uddin of his office during his life-time. The position in Mohammedan law is not entirely clear but on the whole it seems to me that the proper inference to be drawn from the authorities is that a waqif mutawalli has the power to resign his office even during his life-time and to appoint a successor. We have been referred to a number of authorities. It is stated by Mulla in S. 165 of his Mohammedan Law, para. 2, that

"If any person appointed as mutawalli dies, or refuses to act in the trust . . . and there is no provision in the deed of waqf regarding succession to the office, a new mutawalli may be appointed (a) by the founder of the waqf . . . . ."

The statement of the law is possibly rather too general and, in any case, strictly speaking, it covers the case of the resignation of a mutawalli appointed by the waqif other than himself. As mentioned in the leading case on this subject, 37 Cal. 263,<sup>1</sup> Baillie in his Digest of Mohammedan Law, Vol. 1, Ed., 1 p. 594, Ed. 2, p. 604, observes that:

"While a superintendent (mutawalli) may at death commit his office to another in the same way as an executor may commit his office to another, a superintendent, while alive and in good health, cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust . . . By

the term 'general trust' it is signified that the mutawalli at the time of his appointment was such as should receive the power of transferring the trust to another and substituting that other in his own place."

The implication of the passage is that the waqif or settlor has this general power himself and can confer it on the mutawalli whom he appoints under the waqfnama. It has been suggested in argument that where a waqif appoints himself as the first mutawalli without reserving to himself the power of resignation while in good health and of appointment of a successor in his life time, the waqif should be presumed not to have reserved that power. On the other hand, it seems to be recognised that a waqif is a person who occupies a rather exceptional position and to whose wishes special attention has to be paid. It would therefore seem that there ought rather to be some indication that the waqif by appointing himself has also given up his general or residual powers.

[40] Ameer Ali has dealt with this matter indirectly in a number of passages in Chap. XV of his Mohammedan Law (Tagore Law Lectures, 1884). At p. 441 he quotes from the authorities: "The waqif is primarily entitled to appoint a mutawalli for the management of the trust." Again,

"It is lawful for the waqif to reserve the towliat (the governance of the trust) for himself. And where a waqf has been created, but the waqif has appointed no trustee or mutawalli for the administration of the waqf, nor has expressly reserved the towliat for himself, the office would nevertheless appertain to him qua waqif. He has the power of appointing a mutawalli during his life time whenever he likes."

At p. 453 he says :

"A mutawalli cannot give up the office of towliat of his own motion; he must obtain the permission of the kazi to retire from his office. Some jurists appear, no doubt, to have expressed an opinion that a mutawalli can resign his post in favour of another, but they have also held that the latter will not become mutawalli until his appointment has been sanctioned by the kazi."

Again, at p. 454 :

"The mutawalli cannot, however, assign or transfer the office to any one, or appoint another during his life time, unless his own powers are 'general.' Should he in his life time and in health appoint another in his place, the appointment will not be lawful and valid, unless the mutawalli has obtained the towliat with that condition, 'in a general manner.'"

At p. 455 the expression "in a general manner" is explained as follows : As regards the meaning of the expression "in a general manner" the author of the Radd-ul-Muhtar explains it as follows:

"It means that if the waqif or Kazi were to make a condition at the time of appointing the mutawalli, that he should have the power of transferring the trust to another and substituting that other in his own place by a sanad-i-wakf or wasiat, should necessity arise for it, such a condition would carry with it the power, on the part of the mutawalli to appoint another mutawalli during his life time or in death illness."



If the appointment of the mutawalli, or the assignment to him of the trust, is not general in its nature as stated above, in other words, when the mutawalli does not possess general powers, he cannot assign the trust to another "in health," whilst capable of discharging the functions of the office. The appointment of another mutawalli by one who does not possess general powers, without the leave of the kazi, is tantamount to a withdrawal of the incumbent from office, yet he remains responsible, unless the appointment or transfer of the trust is subsequently confirmed by the Kazi. There is a further explanation of the term "in a general manner" at p. 456 where he says :

"With reference to a mutawalli appointed in a general manner, the meaning of the term 'general' is thus explained in the *Anfa'sa-ul Wasail* : 'that the waqif appoints a mutawalli and places him in his own place and constitutes him his successor, and authorises him to assign the trust to whomsoever he likes; in such a case the mutawalli can transfer the trust either in health or death illness.'

[41] We have also been referred to Tyabji's principles of Mohammedan Law. In S. 495 of this treatise it is stated that "The mutawalli cannot discharge himself from his office, without the permission of the waqif or of the Court." By S. 495A, "The mutawalli cannot during his life time transfer his office to another, much less sell it." By S. 495B,

"If the waqif or his executor purports to appoint himself the mutawalli, or acts as such, it does not deprive him of the power of transferring the office of mutawalli to another under S. 492 above."

Section 492 provides that

"In the absence of any express or implied provision in the declaration of waqf for the appointment of successive mutawallis—(1) the waqif is entitled to make the appointment."

In the waqfnama with which we are concerned, the provisions for the appointment of a successor mutawalli only come into effect on the death of the waqif mutawalli. Section 495B depends on how the act of the waqif in appointing himself the first mutawalli without making any specific reservation of particular powers is interpreted. The point is not directly dealt with in the leading case in 37 Cal. 263<sup>1</sup> referred to above which only quotes the same passage from the Kunyah referred to by Tyabji. The passage is as follows :

"It is laid down in the Kunyah: If the mutawalli appointed by the founder says 'I resign my mutawalliship' (literally I dismiss myself), this declaration has no effect (and he continues as mutawalli) unless the declaration is made in the presence of the founder or the *cadi*, who would thereupon remove him (*Fatawa Mahoiyah*; also *Fatawa Alamgiri*, Vol. II, p. 509, line 6. . ."

[42] The interpretation embodied in Tyabji's S. 495B is the one which was accepted by the Calcutta High Court in a later case, 20 C. W. N. 605.<sup>4</sup> At p. 607 the learned Judges remarked :

"It is said that a mutawalli cannot renounce and appoint another mutawalli. That may be so in respect of a mutawalli who is not himself the appropriator. Atibunnessa in the *towliatnama* of 1894 expressly says that she was acting in her double capacity. She renounced in her capacity of mutawalli but appointed Ghafoor in her capacity of the waqif. It is laid down in the Kunyah : If the mutawalli appointed by the founder says, 'I resign my mutawalliship' this declaration has no effect unless the declaration is made in the presence of the founder or the *Cadi*, who would thereupon remove him." *Fatawa Mahdiya*, Vol. II, p. 575 quoted in 37 Cal. 263.<sup>1</sup> Here the founder herself made the renouncement to herself and made the appointment herself; such an appointment by the founder is quite distinguishable from an appointment by one mutawalli of another without the intervention of the founder or the *Cadi*. This appointment, however, cannot enure against the express terms of the original deed of waqf, and must terminate with the life of the waqif. This case is, therefore, clearly distinguishable from the case in 37 Cal. 263.<sup>1</sup>"

[43] In the light of the above quotations from the authorities and the commentators and the decision of the Calcutta High Court, it certainly seems to me to be reasonable to conclude that a waqif who appoints himself as mutawalli does not thereby deprive himself of his general power, which he could have conferred on a mutawalli appointed by him under the waqfnama, to resign office and appoint a successor during his lifetime despite the fact that he is in good health.

[44] It is contended by Sir Wazir Hasan on behalf of the appellant that on this view it was open to Salah Uddin as waqif to relinquish his office and to make an appointment even of a stranger as mutawalli during his lifetime and that in doing so he was not bound by the provisions of the waqfnama of 1915 since the waqfnama is silent on the point. Alternatively it is contended that the appointment is consistent with the terms of the waqfnama which provide only that the waqif shall appoint one of his male issues as a mutawalli.

[45] It is necessary here to consider the exact terms of the waqfnama. In what might be called the general recital of the waqfnama Ex. A-3 Salah Uddin, after setting forth that he has one son, two daughters and two wives all of whom he names, recites :

"My object is to take lawful advantage of the waqf for children sanctioned by Islam and accepted by the British Government and Act 6 [VI] of 1913 which is in force for the time being and to make permanent arrangement for the perpetual support of my children and children's children generation after generation. . ."

In para. 1 of the numbered paragraphs he says : "I myself will remain the mutawalli of the waqf property during my lifetime and I will spend the income from the waqf property for my support and for the support of my children and wives. . ."

In para. 3 he specifies the manner in which the income of the waqf is to be expended and says : "the expenses relating to the education and support of my children shall be met first from the income of the waqf property; during my lifetime I shall spend money



on these things as I think proper and I shall continue to meet my personal expenses with the same income. Along therewith I shall give money to my both wives to meet their expenses and help my needy relations in a proper way from the same income. After my death out of the income from the waqf property Rs. 100 would continue to be paid to my first wife Mt. Tahir-un-nisa and Rs. 100 to my second wife Mt. Asghari Begum per mensem, provided I do not sever my connections with my wives during my lifetime and they may be living and taking food with me, and Rs. 100 to each of my daughters. If God willing my wives give birth to other issues besides the present issues, each son shall continue to receive Rs. 300 and each daughter Rs. 100 per mensem out of the income from the waqf property."

He then goes on to provide for the descendants of these mentioned son and daughters and to provide for a proportionate reduction in case the number is too large to allow payment of the prescribed allowances.

[46] I have already set out the conclusions of the learned Civil Judge as to the meaning of this document and it is not necessary really to say more in regard to the interpretation than that in my judgment his conclusion is correct that this was a waqf for the benefit only of the family of Salah Uddin as it existed then, plus such further children as might be born to the two wives, Mt. Tahir-un-nisa and Mt. Asghari Begum and their descendants. The general recitals about his desire to take advantage of the legality of executing a waqf alalaulad do not appear to me to detract from the soundness of that conclusion. The learned Civil Judge has rightly said that it is not within the general powers of a waqif to alter the beneficiaries under a waqf-alalaulad or indeed under any other waqf once it has been validly executed by him; but that is a point which will not arise on the view which I take, in agreement with my learned brother, on the next point for decision. The question which has to be considered here is what is the correct interpretation of the numbered para. 2 in the light of the above conclusions? In the first place, I am of opinion that bearing in mind the whole of the terms of this waqfnama, the words "any one of my male issues" in this paragraph must be interpreted as limited to male issues of either of the two wives Mt. Asghari Begum and Mt. Tahir-un-nisa. It would follow that the appointment of Ali Asghar could in no case be effective after the lifetime of Salah Uddin : *vide* 20 C. W. N. 605<sup>4</sup> cited earlier. The further question, however, arises as to whether, assuming the waqif to have power to resign during his lifetime and, therefore, to appoint a mutawalli in his place, the appointment of Ali Asghar or in fact of an absolute stranger could be valid even for the lifetime of the waqif, bearing in mind the terms of the waqfnama. In a way, it may be said to be contrary to the spirit

of the waqfnama, but it can also with reason be said that during the lifetime of the settlor no specific benefits are conferred on the wives and children of the settlor who in effect (*vide* paras. 1 and 3 of the waqfnama) retains complete control over the residual income of the property. The appointment of even a stranger, therefore, does not operate as a deprivation against the wives and children. The answer must depend ultimately, I think, on the interpretation of the first sentence of para. 2 read with the statement in para. 1. The question then is does the provision "I shall, during my lifetime, appoint any one of my male issues as mutawalli of the waqf property," relate only to an appointment to take effect after the settlor's death or does it also govern any appointment he may make during his lifetime and for the remainder of his lifetime? In this connection it appears to me inevitable, that full weight must be given to what is said in paras. 1 and 3 of the waqfnama in which it is definitely stated that the settlor will occupy the office of mutawalli for his lifetime and, therefore, retain the benefits of that office. Had the first few sentences of para. 2 stood by themselves they would have been capable of the interpretation that any appointment made by the settlor during his lifetime must be governed by the rule of appointment of one of his male issues, that is one of the beneficiaries specified in para. 3. Reading this paragraph, however, along with other paragraphs, it appears to me that it was open to the settlor in the exercise of his residual powers as settlor to resign his office and to make an appointment even of a stranger which would be effective for his lifetime. The question whether such an appointment will be effective after his death does not really arise for decision in the present suit. That is a point which may arise for decision in some future litigation and must be left for decision when it arises. In these circumstances, I am of opinion that the view taken by the learned Civil Judge that the resignation of Salah Uddin operates as a kind of civil death cannot be supported. I would hold that the resignation and the appointment of Ali Asghar by the deed of 14th May 1937 is valid. The plaintiff's suit should, therefore, have been dismissed.

[47] I would allow this appeal, set aside the decree of the learned Civil Judge and order that the suit be dismissed with costs of both Courts.

[48] **By the Court.** — We allow this appeal and substitute for the decree of the lower Court an order that the suit be dismissed with costs in both Courts.

K.S.

*Appeal allowed.*



**A. I. R. (34) 1947 Allahabad 275 [C.N. 112.]**

WALI ULLAH AND BENNETT JJ.

*Ram Charittar Singh and another—Defendants — Appellants v. Tej Prasad Tewari and others, Plaintiffs and others, Defendants — Respondents.*

First Appeal No. 259 and S. A. Nos. 1052 and 1053 of 1943, Decided on 15-1-1946, from decision of Civil Judge, Azamgarh, D/- 29-4-1943.

(a) Agra Pre-emption Act (11 [XI] of 1922), S. 5 —Wajib-ul-arz — Entries in.

Where the wajib-ul-arz of a mahal comprising several villages, recorded no right of pre-emption but the wajib-ul-arz of three of the villages recorded such right but not the wajib-ul-arz of the village in respect of which pre-emption was claimed.

Held that the right of pre-emption prevailing in the three villages could not govern all the villages comprised in the mahal when the wajib-ul-arz of the mahal itself recorded no right of pre-emption and therefore no right of pre-emption prevailed in the village in question: 16 A.I.R. 1929 All 977 (F. B.), Doubtful and disting.; Case law discussed. [Paras 25 and 34]

(b) Agra Pre-emption Act (11 [XI] of 1922), S. 5 (1) (a) — Wajib-ul-arz — Right of pre-emption declared in favour of inferior proprietors—Superior proprietors if can enjoy right.

Per Bennett J. —It cannot be held that because the right of pre-emption declared in the wajib-ul-arz relates only to inferior proprietors the superior proprietors do not also enjoy the right. [Para 14]

(c) Agra Pre-emption Act (11 [XI] of 1922), S. 5 (2), Explanation.

Per Bennett J.—The explanation must be construed as referring to any other wajib-ul-arz of the same mahal or village. When the mahal and village are not co-extensive they should not be treated, in construing S. 5, as if they were. [Para 22]

Cases referred:—

1. ('29) 1929 A. L. J. 1212 : 16 A. I. R. 1929 All. 977 : 123 I. C. 110 : 52 All. 225 (F. B.), Riaz Uddin v. Mt. Phula Devi.
2. ('29) 1929 A. L. J. 429 : 16 A. I. R. 1929 All. 385 : 51 All. 594 : 115 I. C. 800, Lalta Prasad v. Chunni Singh.
3. ('35) 1935 A. L. J. 973 : 22 A. I. R. 1935 P. C. 169 : 157 I. C. 423 (P. C.), Ramjimal v. Riaz Uddin.
4. ('40) 1940 A. L. J. 370 : 27 A. I. R. 1940 All. 422 : 190 I. C. 141, Mohan Singh v. Shiv Charan Singh.
5. ('27) 25 A. L. J. 487 : 14 A. I. R. 1927 All. 320 : 100 I. C. 704, Yasrab Bano v. Zahur Hussain.
6. ('30) 1930 A. L. J. 1115 : 17 A. I. R. 1930 All. 446 : 52 All. 562 : 128 I. C. 5, Dattu Singh v. Chhakan Singh.
7. ('27) 25 A. L. J. 109 : 14 A. I. R. 1927 All. 277 : 49 All. 139 : 98 I. C. 816, Shyam Lal v. Dwarka Prasad.
8. ('29) 1929 A. L. J. 595 : 117 I. C. 106, Sri Ram Lakshman Janki v. Ram Gopal.

P. L. Banerji and Ambika Prasad—for Appellants.  
K. L. Misra—for Respondents.

Bennett J. — These appeals raise the same question, whether a right of pre-emption exists in a village called Panti, which is described as forming part of Taluqa Dasaon Saltanat, Pargana Atraulia, District Azamgarh.

[2] Three suits were brought by residents of this village claiming pre-emption in respect of

separate sales. Two of these suits were instituted in the Court of the Munsif and the third in the Court of Civil Judge of Azamgarh. The Munsif dismissed the suits, holding that there was no right of pre-emption in Panti. The Civil Judge decreed the suit in his Court, holding that there was; and on the same date, 29-4-1943, he allowed appeals from the judgments of the Munsif and decreed both these suits also. Hence the first appeal and two second appeals in this Court.

[3] At the settlement of 1873-1874 Panti was one of a number of villages, 16 in all, comprised in Taluqa Dasaon Saltanat. A lady, the daughter of one Saltenat Singh, is shown in the wajib-ul-arz of that settlement as the absolute owner.

[4] The complete wajib-ul-arz is not on the record. All that we have is the first part of it, referring to the whole Taluqa as a mahal consisting of 16 villages, and containing the remark that as there is no cosharer it is unnecessary to record any conditions relating to pre-emption. There follow appendices for individual villages. Copies of three of these are on the record, Panti, Jogipur and Hathipur. The appendices are described as wajib-ul-arzes for these mauzas or villages. That of Panti suggests that there is no right of pre-emption in that village, while those of Jogipur and Hathipur show that such right exists in them.

[5] It is also to be noted that the right in Jogipur and Hathipur could only have been enjoyed by petty proprietors when the wajib-ul-arzes were prepared. Whether there were at the time petty proprietors in the other villages does not appear.

[6] The Taluqa is now held by a number of co-sharers and the question for consideration is whether the right of pre-emption should be held to exist in Panti among the superior proprietors.

[7] It is conceded that no right of pre-emption is shown by the wajib-ul-arzes to exist in any part of the Taluqa except the two villages of Jogipur and Hathipur, but it is argued that S. 5, Pre-emption Act of 1922 extends the right from part of the mahal to the whole mahal.

[8] The first part of S. 5, Agra Pre-emption Act, 1922, runs thus:

(1) "A right of pre-emption shall be deemed to exist only in mahals or villages in respect of which any wajib-ul-arz prepared prior to the commencement of this Act records a custom, contract or declaration.

(a) recognizing, conferring or declaring a right of pre-emption, expressly or by necessary implication, whatever its extent and in whatever form it may be expressed."

[9] It has been held that the latter words "whatever its extent and in whatever form it may be expressed" imply that even if the right entered in the wajib-ul-arz is limited in its



scope and applies either to a limited body of co-sharers or to a limited area, a right in the whole *mahal* or village is to be deemed to exist. It was so held by Sulaiman A. C. J., in the Full Bench case in 1929 A. L. J. 1212<sup>1</sup> and also in 1929 A. L. J. 429<sup>2</sup> and the same construction was put upon the words in the Full Bench case by Mukherji J. who observed :

"The result of the joint application of the two expressions "in respect of" and "whatever its extent" is that if in any *mahal* as to which a question of right of pre-emption has arisen, there be found to exist a *wajib-ul-arz* which contained a mention of pre-emption, applicable to any portion of the *mahal*, by virtue of the rule enacted by the Legislature, a right of pre-emption would be deemed to exist throughout the whole *mahal*."

[10] The third Judge, in the Full Bench case, King J., did not touch in his judgment on this point but concurred generally in the conclusions of the other learned Judges.

[11] But for these decisions I must confess that I should have felt some doubt on the point, for, it would seem that if the Legislature had intended this result it could have expressed its intention much more clearly by enacting that "a right of pre-emption shall be deemed to exist for all cosharers or petty proprietors in the whole of any *mahal* or village in respect of which etc...." Without some such words it would, I think, be possible to construe the expression "whatever its extent" as meaning that the right shall exist to the extent recognized, conferred or declared in the *wajib-ul-arz*, whatever that extent may be. The other expression "in whatever form it may be expressed" has no bearing to my mind on the question of extent.

[12] It may no doubt be argued that sub-s. (3) of S. 5

"Where any right or custom referred to in sub-s. (1) has been recorded in respect of any village or *mahal*, and such village or *mahal* has been partitioned, a right of pre-emption shall be deemed to exist in all the portions into which such village or *mahal* has been divided."

supports the view taken and I agree that there is some force in this argument, but I do not think it is conclusive. It certainly seems a little surprising that where a *wajib-ul-arz* indicates the existence of the right only among Moham-madans, for instance, the legislature should have extended it to Hindus also. In such a case there would be no difficulty on partition in confining the right to Mohammadans, nor, where the pre-emption area in the *mahal* or village was limited, should there be any difficulty on partition in confining the right to the portions into which the whole area subject to the right is divided.

[13] On the other hand, it may be said that the purpose of the enactment was to simplify the law and base the right primarily on the fact that the persons concerned are cosharers, of

whatever creed or caste, and not relations, relationship only entering into the matter where more persons than one of the same class (of the five classes specified in S. 12) claim pre-emption.

[14] But, so far as we are concerned, this question must be regarded as only of academic interest, it having been held by the Full Bench that where a right of pre-emption is allowed to any extent in a *wajib-ul-arz* prepared before the Act of 1922 came into force it extends to the whole *mahal* or village in question and for the same reason we should not be justified in holding that because the right declared in the *wajib-ul-arz* relates only to inferior proprietors the superior proprietors do not also under S. 5 enjoy the right. To justify such a view we should have to give a purely territorial significance to the word "extent".

[15] This being the legal position as regards the effect of S. 5, we may now see how the particular question which arose in these cases was dealt with by the Munsif and the Civil Judge. The Munsif thought the composite *wajib-ul-arz* "a curious document", and the evidence before him indicated in his opinion that no separate *wajib-ul-arz* was prepared for Panti, there being only a provision that the conditions laid down for the *mahal* as a whole would govern Panti also. With regard to this, we may say that we were shown a document which we understood to be a *wajib-ul-arz* of this village, but the names of some of the villages in this *mahal* are by no means clearly written and the printed record shows that mistakes have been made in consequence in translation. But this is immaterial as it is not disputed that what is said for the *mahal* as a whole, excluding Jogipur and Hathipur applies to Panti.

[16] The Munsif proceeded to say :

"It was contended by the learned counsel for plaintiffs that the *wajib-ul-arz* of village Jogipur will govern Panti as it is an appendix and as such must relate to all the villages comprised in *mahal* Dasaon Saltanat. This argument, if accepted, will lead to great confusion. If the *wajib-ul-arz* of village Jogipur, being an appendix, applied to all the villages then the entry regarding *mahal* Dasaon Saltanat, which is to the effect that the village, being zamindari of a single proprietor, no record regarding pre-emption was necessary, will become meaningless."

The Munsif then referred to the fact that Panti itself became a separate *mahal* at the Settlement of 1307 F. (1900 A. D.), but he said that as no *wajib-ul-arz* was prepared for it at that Settlement the *wajib-ul-arz* prepared prior to the Act would have settled the question had it provided for the right of pre-emption.

[17] The Civil Judge relied on the view taken in the Full Bench case as to the construction of S. 5, and also on the explanation appended to sub-s. (2) of this section.



"Where any such record is proved the existence of an inconsistent or contradictory record in any other *wajib-ul-arz* is immaterial."

[18] There being a record of the existence of the right in a part of the mahal it followed in his opinion that the right must be held to exist throughout the whole mahal.

[19] In the Full Bench case the facts were not at all similar to those of the present case, for the question there was whether, when an existing mahal contains portions of earlier mahals, the *wajib-ul-arzes* of some of which contain entries recording a right of pre-emption and of others do not, a right can be presumed to exist in respect of the whole of the existing mahal.

[20] The Full Bench answered this question in the affirmative, but the Privy Council in 1935 A. L. J. 973<sup>3</sup> allowed an appeal from their judgment, though not on the ground that this question was answered wrongly, but on the ground that the plaintiff had not proved that he was a cosharer in the mahal. At the same time, they made observations which certainly suggest doubt on some portions of the High Court judgment, though they refrained from making any definite pronouncement as to the propriety of the view taken by the High Court. Their Lordships observed :

"The Court of first instance held that the right of pre-emption should be confined to that plot which was pre-emptible, when it formed part of the *mahal* which recognised the right of pre-emption. That view has not been accepted by the High Court, who find that the entry of the *wajib-ul-arz* of the *mahal* favouring the right of pre-emption should govern the entire land of the composite *mahal*.

Their Lordships find it difficult to follow the reasoning of the learned Judges. They do not see any valid ground for preferring one entry to the rival entry about the existence or non-existence of the right of pre-emption. Suppose there is a *mahal* consisting of 1000 acres, in respect of which the *wajib-ul-arz* contains an entry against the existence of the right of pre-emption. It would, according to the High Court, be open to the proprietors of that *mahal* to create the right of pre-emption in respect of the entire area by adding to it one acre taken out of an adjoining *mahal* recognising the right of pre-emption and thereby making a new *mahal* of the two plots. There would then be a right of pre-emption in respect of not only one acre but also one thousand acres, which constituted the original *mahal*, and enjoyed at that time immunity from the restrictions imposed by the law of pre-emption."

We put this supposed case to the learned counsel for the respondent, with the further supposition that a composite *wajib-ul-arz* was prepared for the new *mahal* before the Act of 1922, this indicating that there was a right of pre-emption for the one acre and no such right for the remaining 1000 acres, and asked what the resulting legal position would be. He replied that after the commencement of the Act the right would prevail throughout the whole *mahal*. And certainly on the construction placed by the Full Bench on

S. 5 I do not think that any other reply was possible.

[21] But it seems to me that the facts in the present case distinguish it and that the questions so far considered in this judgment do not really arise. Section 5 refers both to *mahals* and to villages. A *mahal* may consist of a single village, and if we were considering such a *mahal* the observations in the Full Bench case which have been particularly referred to would doubtless be relevant. But a *mahal* may include more than one village, as in the present case, and a village may include more than one *mahal*. What has to be seen under the section is whether the *wajib-ul-arz* recording the custom is of a *mahal* or of a village. Where it is of a *mahal* which forms part of a village I cannot find anything in the section which extends it to the whole village, or, where it is of a village, anything which extends it to the whole *mahal*.

[22] The *wajib-ul-arzes* upon which the right of pre-emption is founded in the present case are of two villages, Jogipur and Hathipur. Learned counsel for the respondents argues that as there is a *wajib-ul-arz* of the whole *mahal* which includes these villages it should be held that the right exists in the *mahal* as a whole having regard to the Full Bench observations. In my view, the general provision for the whole *mahal* would only govern the separate villages if there was no separate *wajib-ul-arz* relating to them. But in any event, the claim to pre-empt is not and could not be based on the general provision in this case, for the general provision negatives it. The general *wajib-ul-arz* is only brought in to assist on the argument that by S. 5 the particular provisions for part of the *mahal* are substituted for the general provisions. I do not overlook the explanation :

"Where any such record is proved the existence of an inconsistent or contradictory record in any other *wajib-ul-arz* is immaterial."

but I construe this as referring to any other *wajib-ul-arz* of the same *mahal* or village. Where the *mahal* and village are not co-extensive, they should not in my opinion be treated in construing S. 5 as if they were.

[23] The view which I take finds some support from a decision of a learned single Judge of this Court in 1940 A. L. J. 370.<sup>4</sup> This was a converse case to the present; in that the right of pre-emption was shown to exist in a consolidated *wajib-ul-arz* of a number of villages situated in a particular *pargana*, while in the *wajib-ul-arz* of one of these villages it was not shown to exist. The learned Judge observed :

"In view of the wording of S. 5 the *wajib-ul-arz* recording a custom, contract, or declaration about the right of pre-emption must be a *wajib-ul-arz* with respect to the *mahal* or village in which the property



transferred is situated. The *wajib-ul-arz* relied upon by the plaintiffs does not purport to be a *wajib-ul-arz* with respect to any particular *mahal* or to any particular village. On the other hand, it purports to be a consolidated *wajib-ul-arz* with respect to all the villages in a particular *pargana*. That *wajib-ul-arz* is not therefore such a *wajib-ul-arz* as is contemplated by S. 5, Agra Pre-emption Act."

[24] It does not appear that the consolidated *wajib-ul-arz* in that case was of a single *mahal* and that may be thought to differentiate the case from the present case, where we have a *wajib-ul-arz* which purports to be a *wajib-ul-arz* of a single *mahal* comprising a number of villages, for some of which there were also separate *wajib-ul-arzes*.

[25] I would rely therefore rather on the argument that in such a case we have primarily to consider the *wajib-ul-arz* which contains a record of the custom. In the present case that *wajib-ul-arz* is of a village and not of a *mahal* and I find no justification in S. 5 for extending the right from a village to a *mahal* merely because the village has been included in the *mahal*. Apart from the wording of the section it would certainly seem rather extraordinary that, merely because the revenue authorities have combined a number of villages in one *mahal* for the purpose of fiscal convenience, the right of pre-emption prevailing in some of them should be extended to all.

[26] For these reasons I think that the view taken by the munsif should be held to be the right view. I would accordingly allow these appeals, restore the munsif's decrees dismissing the suits in his Court, and dismiss the suit in the Court of the Civil Judge, with costs to the appellants in all three cases throughout.

[27] **Wali Ullah J.**—These three appeals are connected and they arise out of three suits instituted to pre-empt the property conveyed by three different sale-deeds executed on different dates in the years 1940 and 1941 of shares in village Panti. Two of the sale deeds were for Rs. 2000 and Rs. 750 respectively and suits in respect of those deeds were instituted in the Court of the Munsif whereas the third sale deed dated 15-8-1941 was for an amount of Rs. 6401 and the suit in respect of this deed was instituted in the Court of the learned Civil Judge, Azamgarh. Both the suits filed in the Court of the learned Munsif were dismissed by him. On appeal, however, the learned Civil Judge reversed the finding of the learned Munsif on the question of the existence of custom and decreed both the suits on 29-4-1943. The same learned Civil Judge also heard the suit out of which First Appeal No. 259 of 1943 has arisen. He recorded a finding that the right of pre-emption exists in village Panti and decreed the suit with costs on the same day,

i. e., 29-4-1943. As the same question with regard to the existence of custom of pre-emption in village Panti is involved in these appeals they have been heard together and are being disposed of by a single judgment.

[28] The sole question which has been argued and which has to be decided is whether on a proper construction of the *wajib-ul-arz* on the record it is to be held that a right of pre-emption exists in village Panti, *pergana* Atraulia, *tahasil* Phoolpur, district Azamgarh. It appears that at the time of the settlement of 1873-74 village Panti was one of the sixteen villages included in *mahal* Dasaon Saltanat which is also described as *Taluqa* Dasaon Saltanat. A *wajib-ul-arz* prepared during the time of the settlement purporting to relate to the entire *mahal* Dasaon Saltanat is on the record. It is Ex. A-3. The complete *wajib-ul-arz* of *mahal* Dasaon Saltanat has not been filed by any of the parties to this litigation. In addition to Ex. A-3 we have on the record another extract which is described as *wajib-ul-arz* of *mauza* Hatipur, Ex. 3. There is also on the record an extract from the *wajib-ul-arz* relating to villages Jogipur and Bairai. Lastly on the record of Second Appeal No. 1053 of 1943 there is an extract from the *wajib-ul-arz* purporting to relate to village Panti. An examination of these extracts from the *wajib-ul-arzes* makes it very clear that so far as the entire *mahal* Dasaon Saltanat is concerned there is no record of any right of pre-emption. The *wajib-ul-arz* relating to the *mahal* states that there is only one owner of the entire *taluka* or *mahal* and there is, therefore, "no necessity of recording any conditions relating to pre-emption." The extract from the *wajib-ul-arz* of village Panti is also worded similarly and there also it is stated that the entire village belongs to one single proprietor and there is no necessity of recording any conditions relating to pre-emption. The extracts from the *wajib-ul-arzes* of villages Hatipur, Jogipur and Bairai no doubt record a right of pre-emption. The *wajib-ul-arzes* relating to individual villages Panti, Jogipur, Bairai and Hatipur appear to be so many "appendices" to the main *wajib-ul-arz* relating to village Dasaon Saltanat. In view of these entries in the various *wajib-ul-arzes* the question arises whether it can be said in respect of village Panti that there exists a *wajib-ul-arz* prepared prior to the commencement of the Agra Pre-emption Act, 1922, which records a right of pre-emption. The learned Civil Judge was of the opinion that the entry recording a right of pre-emption in villages Jogipur and Hatipur which were parts of *mahal* Dasaon Saltanat must be held to create a right of pre-emption with regard to the whole of the *mahal* of Dasaon Saltanat including the village Panti.



The learned Civil Judge has referred to the Full Bench decision of this Court in 1929 A. L. J. 1212<sup>1</sup> where it was held :

"When an existing *mahal* contains portions of earlier *mahals* the *wajib-ul-arzes* of some of which contain entries recording a right of pre-emption and of the others do not, a right can be presumed to exist in respect of the whole of the existing *mahal*."

The fact that the *wajib-ul-arz* relating the village Panti itself has no record of a right of pre-emption was considered by the learned Civil Judge to be immaterial in view of the explanation added to S. 5, Agra Pre-emption Act.

[29] Learned counsel for the appellants has, however, contended that in the first place the interpretation put upon the provisions of S. 5, Pre-emption Act by the Full Bench referred to above does not lend any support to the soundness of the view taken by the learned Civil Judge with regard to the interpretation of the *wajib-ul-arz* in the present case. In the next place it is contended that the correctness of the view expressed by the Full Bench was seriously doubted when the same case went up in appeal to their Lordships of the Privy Council. Our attention has been invited to the decision of their Lordships of the Privy Council reported in 1935 A. L. J. 973,<sup>3</sup> where at p. 976 their Lordships are reported to have observed :

"Their Lordships find it difficult to follow the reasoning of the learned Judges. They do not see any valid ground for preferring one entry to the rival entry about the existence or non-existence of the right of pre-emption. Suppose, there is a *mahal* consisting of 1000 acres, in respect of which the *wajib-ul-arz* contains an entry against the existence of the right of pre-emption. It would, according to the High Court, be open to the proprietors of that *mahal* to create the right of pre-emption in respect of the entire area by adding to it one acre taken out of an adjoining *mahal* recognising the right of pre-emption, and thereby making a new *mahal* of the two plots. There would then be a right of pre-emption in respect of not only one acre, but also one thousand acres, which constituted the original *mahal* and enjoyed, at that time, immunity from the restrictions imposed by the law of pre-emption."

It must, however, be noted that their Lordships of the Privy Council did not consider it necessary to make any definite pronouncement on the subject as, in their view, it was quite clear that the plaintiff had failed to establish that he was a cosharer in the *mahal* and on that ground the appeal was decided.

[30] The learned counsel for the respondents has, however, strenuously contended that on a proper interpretation of the provisions of S. 5 of the Act it would follow that in a case like the present where there is a right of pre-emption prevalent in one of the several villages comprised in a single *mahal* the right of pre-emption must be deemed to exist in the entire *mahal*. He has contended that the expression "whatever

its extent and in whatever form it may be expressed" in S. 5 (1) (a) has been the subject-matter of several decisions in this Court and in the light of those decisions, so he contends, it must be held that village Panti is also affected by the right of pre-emption which is recorded in the *wajib-ul-arzes* relating to villages Hatipur and Jogipur which are component units of the same *mahal* as village Panti itself is. Learned counsel has conceded that the precise question which arises in the present case did not actually arise in the case decided by the Full Bench and in view of the observations of their Lordships of the Privy Council quoted above he does not propose to take his stand upon the line of reasoning adopted by the Full Bench in 1929 A. L. J. 1212.<sup>1</sup>

[31] I now proceed to consider some of the decisions of this Court which have been cited regarding the interpretation of the expression "whatever its extent and in whatever form it is expressed" in order to see whether they lend any support to the contention of the learned counsel. 25 A. L. J. 487.<sup>5</sup> In this case two learned Judges of this Court held:

"If there is a record of custom in the *wajib-ul-arz* providing for pre-emption, whatever the extent of custom may be and in whatever way it may be expressed, there is a right of pre-emption under the Agra Pre-emption Act which can be exercised in respect of a petty proprietary interest."

It was argued in that case that the right of pre-emption extended only to a sale of proprietary interest. This contention, however, was repelled by their Lordships and it was held that whatever the extent of the custom may be and in whatever way it may be expressed, a right of pre-emption under the Act could be exercised in respect of a petty proprietary interest.

[32] 1929 A. L. J. 429.<sup>2</sup> In this case also two learned Judges of this Court held that:

"When a right of pre-emption is recorded in a *wajib-ul-arz* of the *manal*, a right must be deemed to exist in view of the provisions of S. 5 of the Act, and the question as to what persons are entitled to exercise this right is to be determined by reference to S. 12 of the Act and not to the recitals in the *wajib-ul-arz*."

In this case the *wajib-ul-arz* recorded a custom of pre-emption but there was a recital in it to the effect that the cosharers of the village had no concern with the resumed *muafi* and a part of the resumed *muafi* land comprised in a *khewat* had been sold.

[33] 1930 A. L. J. 1115.<sup>6</sup> This is a decision by a Bench of two learned Judges of this Court. Their Lordships had to interpret the entry in the *wajib-ul-arz* of 1247 Fasli in the village in question. It was held that it recorded a right of pre-emption. Their Lordships went on to observe:



"It is immaterial to consider to *what extent* that right was *limited* or confined. The existence of such a record of rights raises the presumption under S. 5, Agra Pre-emption Act that a right of pre-emption exists, and that right is to be exercised in accordance with the provisions of Ss. 11 and 12 of the Act."

The plaintiffs and the vendor in that case were recorded as "*Manzooridars*" and classified as inferior proprietors (*malik-i-adna*). They were held to be "*proprietors*" within the meaning of that expression as used in S. 4 of the Act; and the claim was decreed.

[34] None of these cases, in my view, lays down any principle which can be invoked by the learned counsel for the respondents in support of his contention. The case in 25 A. L. J. 109<sup>7</sup> and the case in 1929 A. L. J. 595<sup>8</sup> were cases in which the decision turned upon the interpretation of the terms of the *wajib-ul-arz* concerned and it was held that a right of pre-emption was necessarily implied by the language used in the *wajib-ul-arz* concerned. In the case before us the position in a nutshell is this: The *wajib-ul-arz* of *mahal* Dasaon Saltanat records no right of pre-emption. This *mahal* Dasaon Saltanat comprised no less than sixteen villages. Each of the individual villages appears to have a separate *wajib-ul-arz* of its own appended to the *wajib-ul-arz* of the *mahal*. The *wajib-ul-arz* relating to three of the villages, namely Hatipur, Jogipur and Bairai, no doubt records a custom of pre-emption but the fact remains that the *wajib-ul-arz* relating to village Panti records no such custom. Is there any reason to hold that the right of pre-emption prevailing in three of the villages must govern all the villages comprised in the *mahal* when the *wajib-ul-arz* of the *mahal* itself records no right of pre-emption? Furthermore, can it be held that the right of pre-emption prevails in village Panti when neither the *wajib-ul-arz* of the *mahal* in which village Panti is situate nor the *wajib-ul-arz* of village Panti itself records a right of pre-emption? It seems to me that the answer to both these questions must be in the negative. I find no support either on principle, or in any authority placed before us for the contention of the learned counsel for the respondents. The question whether there is any *wajib-ul-arz* prepared prior to the commencement of the Pre-emption Act which records a custom, contract or declaration with respect to the right of pre-emption *in respect of village Panti* must necessarily depend upon the proper interpretation of the entries in the *wajib-ul-arz*. In the case before us, as mentioned already, the *wajib-ul-arz* of village Panti records no custom. The *wajib-ul-arz* of the *mahal* of which village Panti is only one of the unit villages also records no custom. It must, therefore, follow that there is no *wajib-ul-arz*

in respect of village Panti which records a custom, contract or declaration with respect to the right of pre-emption. Of the ruling cited before us, the case which in its facts comes very near to the facts of the present case is 1940 A. L. J. 370.<sup>4</sup> In that case the *wajib-ul-arz* relied upon by the pre-emptors did not purport to be a *wajib-ul-arz* with respect to any particular *mahal* or to any particular village. On the other hand, it purported to be a consolidated *wajib-ul-arz* with respect to all the villages in a particular *pargana* which included the village in which the sale had been effected. The *wajib-ul-arz* of the village itself contained no mention of the right of pre-emption. It was held that such a *wajib-ul-arz* was not a *wajib-ul-arz* as contemplated by S. 5, Agra Pre-emption Act and the record of the custom of pre-emption contained in the consolidated *wajib-ul-arz* of the *pargana* could not be made the basis of a finding that a custom of pre-emption prevailed in the particular village.

[35] On a careful consideration of the language used in S. 5 of the Act, I can discover no justification for extending the right of pre-emption from a village to a *mahal* simply because the village seems to be situate within the precincts of a *Mahal*. Similarly I find no justification for extending the right from one village to another solely on the ground that the two villages happen to be comprised within the ambit of a single *mahal*.

[36] For the reasons given above, I hold that the plaintiffs have failed to establish a right of pre-emption in village Panti.

[37] In the result, therefore, I would allow Second Appeals Nos. 1052 and 1053 of 1943, set aside the decrees passed by the learned Civil Judge and restore the decrees passed by the learned Munsif dismissing the suits with costs throughout. I would also allow First Appeal No. 259 of 1943, set aside the decree of the learned Civil Judge, and dismiss the suit with costs throughout.

[38] **By the Court:** We allow Second Appeal Nos. 1052 and 1053 of 1943, set aside the decree passed by the learned Civil Judge and restore those passed by the learned Munsif dismissing the suits with costs throughout. We also allow First Appeal No. 259 of 1943, set aside the decree of the learned Civil Judge and dismiss the suit with costs throughout.

V.R.

*Appeals allowed.*



**A. I. R. (34) 1947 Allahabad 281 [C. N. 113]**

ALLSOP J.

*On difference between*

MALIK AND WALI ULLAH JJ.

*Rahmanul Hasan—Plaintiff—Appellant v. Zahurul Hasan and another—Defendants—Respondents.*

First Appeal Nos. 377 and 453 of 1941, Decided on 17-10-1946, from decision of Civil Judge, Allahabad, D/- 12-9-1941.

(a) Evidence Act (1872), S. 31—Admission is not conclusive against any party—Admission shown to be wrong is ineffective.

Per *Malik J.*—An admission is not conclusive evidence against any party. If from the facts it could be shown that the admission was wrong it would fail to have any effect. It is only *prima facie* evidence against the party making the admission and shifts the burden of proof: (1829) 9 B. & C. 577 and 29 All. 184 (P. C.), *Rel. on.* [Para 8]

(b) Mussalman Wakf Validating Act (1913) S. 3—Wakf alal-aulad reserving ultimate benefit to poor or for religious, pious or charitable purposes is valid—Word 'family' does not include any and every relation by blood or marriage.

Per *Malik J.*—A wakf alal-aulad in which the ultimate benefit is expressly or impliedly reserved by the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character is valid. [Para 15]

The word "family" has not been defined in the Act. It is no doubt true that the word "family" has a very wide sense, but it cannot be said that it would include any and every relation by blood or marriage howsoever remote and that all their descendants should be included in that term. Though the rule against perpetuities may be inapplicable in the case of lineal descendants of the wakif, it cannot be said that the section was intended to give the same exemption to the descendants or members of his family, generation after generation, and yet unborn: 15 A. I. R. 1928 All. 516 and 17 A. I. R. 1930 All. 169, *Ref.* [Para 17]

(c) Specific Relief Act (1877), S. 42—Suit against mutawalli—Plaintiff not in possession—Mere declaration that property was not included in wakf claimed—Suit held barred.

Per *Malik J.*—Where the plaintiff who is not in possession of the property and could and ought to have asked for possession merely claims a declaration against the mutawalli that the property was not included in the wakf and the wakif had no right to make a wakf of such property, the suit is barred by S. 42. [Para 17]

(d) Will—Burden on party to prove absence of reasonable doubt as to execution of will—Causes for suspicion existing—Court can hold that will was not executed.

Per *Allsop J.*—Where it is necessary to prove as a positive fact that the will was a forgery as would be the case in a criminal trial it might well be argued that causes for suspicion are not sufficient grounds of proof, but where the burden is on a party to prove that there was no reasonable doubt that the will had in fact been executed by the testator, it cannot be urged that causes for suspicion are not sufficient to justify the finding that the will was not genuine as it is not necessary to arrive at such a finding and if causes for suspicion exist, a Court is perfectly justified in refusing to accept the evidence that the will had been executed. [Para 39]

Cases referred:—

1. (1829) 9 B. & C. 577 : 109 E. R. 215, *Heane v. Rogers.*

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2. ('07) 29 All. 184 : 34 I.A. 27 (P.C.), *Chandra Kumar v. Chandhuri.*

3. ('28) 15 A. I. R. 1928 All. 516 : 51 All. 40 : 111 I. C. 583, *Mt. Musharaf v. Mt. Sikandar Jehan.*

4. ('30) 1930 A. L. J. 109 : 17 A. I. R. 1930 All. 169 : 52 All. 368 : 123 I. C. 369, *Ghazanfar Husain v. Mt. Ahmadi Bibi.*

5. (1804) 10 Ves 522, *Morice v. Bishop of Durham.*

6. ('99) 26 I. A. 71 : 23 Bom. 725 (P. C.), *Ranchordas v. Parvatibai.*

*P. L. Banerji, Mustaq Ahmad, M. N. Agarwala, Lalta Prasad and J. K. Srivastava—*for Appellant.

*S. N. Seth, L. M. Roy, Shah Habeeb and Sq. Rafique—*for Respondents.

**Malik J.**—This appeal arises out of original suit No. 15 of 1937 which was filed in the Court of the Civil Judge of Allahabad and was tried along with suit No. 47 of 1937 filed in the same Court by Syed Zahurul Hasan and another and the two suits were disposed of by a common judgment and two appeals have been filed in this Court.

[2] The suit out of which First Appeal No. 377 of 1941 has arisen was filed by Syed Rahmanul Hasan for a declaration that

"the sum of Rs. 10,000 deposited by Saiyed Sirajul Hasan, the former *mutawalli*, on 24-3-1936, in the Allahabad Bank.... forms part of the 'waqf' property and that the plaintiff as the *mutwalli* is entitled to recover it from the Bank aforesaid."

[3] Dr. Sirajul Hasan died on 10-3-1937. The defendants respondents, Zahurul Hasan and Fatma Bibi, were his step-brother and step-sister. Mt. Azizunnisa, wife of Dr. Sirajul Hasan, died in December 1932. She had executed a *waqf alal-aulad* on 1-6-1920, under which she had appointed Dr. Sirajul Hasan as the first *mutwalli*. The plaintiff's case is that Dr. Sirajul Hasan had with him the sum of Rs. 10,000 which was the income of the *waqf* property which he had deposited in the Allahabad Bank. On the death of Dr. Sirajul Hasan, in accordance with the provisions made in the deed of *waqf* Rahmanul Hasan, the plaintiff, became the next *mutwalli*. He brought this suit claiming the sum of money on the allegation that the money belonged to the *waqf* and that he was, therefore, entitled to the same as the *mutwalli*.

[4] The trial Court held against the plaintiff on the ground that it was not proved that the sum of Rs. 10,000 was *waqf* money and dismissed the plaintiff's suit. Rahmanul Hasan has filed this appeal.

[5] In the Court below though the plaintiff admitted that Mt. Fatma Bibi, defendant 2, was the step-sister of Dr. Sirajul Hasan, the paternity of Zahurul Hasan was denied and it was suggested that he was an illegitimate son of Shauran Bibi, widow of Syed Nurul Hasan, and was born several years after his death. The learned Civil Judge, however, held against the plaintiff and in favour of Zahurul Hasan that he



was the legitimate son of his father, Nurul Hasan. The learned Civil Judge remarked that though the point was raised in the pleadings the matter was not seriously pressed at the time of arguments by learned counsel for the plaintiff. Mr. Mushtaq Ahmad, learned counsel for the appellant, did not challenge the finding of the Court below. The point, therefore, is no longer in dispute that Zahurul Hasan and Fatma Bibi are the step-brother and step-sister of Dr. Sirajul Hasan.

[6] There is one more point which I may mention at the outset that though the point for decision before us is whether the sum of Rs. 10,000 is or is not *waqf* property, Mr. Mushtaq Ahmad learned counsel for the appellant has admitted that his case that the sum of Rs. 10,000 is the *waqf* property depends entirely on the evidentiary value we attach to an admission in a will alleged to have been executed by Dr. Sirajul Hasan on 5.3.1937. The case, therefore, though it really is a case for a declaration as to whether the sum of Rs. 10,000 is or is not *waqf* property, has turned out to be a case where the only point for decision before us is the question whether the will propounded on behalf of Rahmanul Hasan was the last will and testament of Dr. Sirajul Hasan and was genuine. That was the issue which was hotly contested in the lower Court and that is the only issue which has been pressed before us. I may mention that it is unfortunate that the plaintiff instead of filing an application for probate and having the will proved in a probate Court should have attempted this circuitous method of getting a decision on the question of the genuineness of the will, specially in the absence of others who may claim to be beneficially interested under the will and who are not parties to this litigation, the result of which may be that our decision on the question of the validity of the will would not be the final decision on the point and further litigation by other parties, who are not parties to this suit, may be the result.

[7] Dr. Sirajul Hasan originally belonged to Bharatpur. He was born on 18.5.1859, and received some medical training in Agra and was then employed as a hospital assistant in military hospitals. He retired about the year 1919 from Allahabad and it may be that it was on that account that he settled here as a medical practitioner. He was married to Mt. Azizunnisa at an age when he was very young as we find that on 9.12.1879 she is mentioned as his wife. She was a resident of village Shahpur in the district of Fatehpur. They had a daughter, Qamrunnisa, who was married to Mohammad Salim. Qamrunnisa and Mohammad Saleem had two sons, Nurul Hasan and Qamrul Hasan. It is not known when Qamrunnisa died. Qamrul Hasan died

when he was about two years old. Nurul Hasan died in August 1922. Dr. Sirajul Hasan's father was also known as Nurul Hasan. He died in the year 1877. By his first wife, Hayatunnisa, he had Dr. Sirajul Hasan. By his second wife, Shauran Bibi, he had a daughter Fatma and a son, Zahurul Hasan. Mt. Azizunnisa was a daughter of Ghulam Ali and her mother was one Zainab Bibi. Her sister was known as Nasiban Bibi and Rahmanul Hasan, plaintiff, is the son of Nasiban Bibi. Rahmanul Hasan has another brother, Nizamuddin, whose name we find sometimes mentioned in the evidence though that is not of very much importance. Dr. Sirajul Hasan seems to have flourished in his profession and he made some money. As is usual in Indian families, his relations who were not so well off as himself lived with him and were brought up and maintained by him. Zahurul Hasan who was probably a posthumous son, was brought up by Dr. Sirajul Hasan and was admitted into the C. A. V. High School, Allahabad, on 10.7.1896. His residence in the application was given as Shahpur, district Fatehpur. Mt. Fatma Bibi must have been living with her husband, Mukhtar Ahmad, who belonged to village Airayan, district Hathgaon. We do not know when Azizunnisa's relations, that is, Nasiban Bibi's sons, Rahmanul Hasan and Nizamuddin, came to live with Dr. Sirajul Hasan, but there is no doubt that they had for some time been living with him before his death and so was Mohammad Salim, his son-in-law. It appears, however, that as Zahurul Hasan grew up, Dr. Sirajul Hasan found him spiteful and the relations between the two became extremely strained and by about 1914 or 1915 they were on terms of enmity. The position, therefore, in the year 1920 when Mt. Azizunnisa executed a deed of *wakf* was that the entire interest of Dr. Sirajul Hasan and Azizunnisa were centred round Nurul Hasan, their daughter's son. Besides, they had Nasiban Bibi's sons in whom also they were interested.

[8] On 1.6.1920, Mt. Azizunnisa executed a deed of *waqf* under which she made Dr. Sirajul Hasan, the first *mutwalli*. It is provided in this *waqf* that Rs. 30 per annum was to go towards charitable objects and the rest of the income was to go towards the maintenance of Nurul Hasan and his descendants who were to be the *mutwallis* after Dr. Sirajul Hasan and Mt. Azizunnisa, generation after generation. If the branch of Nurul Hasan failed, the next *mutwalli* was to be from among the descendants of Nasiban Bibi. They were to spend one-fourth of the income for charitable purposes and spend the rest on the maintenance of the descendants of Nasiban Bibi. After Nasiban Bibi's line was also exhausted the *waqif* was not interested in any one else and



it is provided that any Hanafi Mussalman could be *mutawalli* of the *waqf* property but he would get only ten per cent. after repairs to the houses, payment of taxes, etc., as his remuneration and the rest of the income would be spent towards the education of Muslim children and other charitable objects. Nurul Hasan predeceased Dr. Sirajul Hasan and Nasiban Bibi and died in August 1922 without having left any descendant. The *wakif* had not foreseen this possibility. The deed is silent as to what is to happen in that contingency. According to the terms of the *waqf* deed, Dr. Sirajul Hasan, so long as he was *mutawalli*, was bound to spend only Rs. 30 annually for charity and there is no provision in the deed of *waqf* about the expenditure of the rest of the income, which was meant for the maintenance of Nurul Hasan and his descendants, in case Nurul Hasan died in the lifetime of Sirajul Hasan and left no descendants. I am doubtful whether this income, if Sirajul Hasan had allowed it to accumulate in his hands, would form part of the *waqf* property. There is no direction in the deed of *waqf* that it should be spent for any charitable object. If Nurul Hasan or any of his descendants had been alive and only part of the income had been spent by Dr. Sirajul Hasan, they could have claimed from him the rest of the money in his hands as their money which had belonged to them. It could not be then urged by Dr. Sirajul Hasan that the accumulations out of the balance of the income after spending Rs. 30 per annum for charity belonged also to *waqf* and in the view that I take about the genuineness of the will it is not necessary for me to express any definite opinion on the point. Learned counsel for the appellant has clearly stated before us that he relies entirely on the admission in the will to prove his case and if he has failed to prove the will his case must fail. An admission is not conclusive evidence against any party. If from the facts it could be shown that the admission was wrong it would fail to have any effect (*see* (1829) 9 B & C. 577<sup>1</sup>; 109 E. R. 215<sup>1</sup>). It is only *prima facie* evidence against the party making the admission and shifts the burden of proof: *see* 29 ALL. 184.<sup>2</sup> Nurul Hasan died in 1922 and Sirajul Hasan in 1936. During this period of fourteen years, the total sum to be spent for charity, according to the *waqf* deed, was Rs. 420 and it could not, therefore, amount to Rs. 10,000.

[9] Apart from that, however, I am not at all satisfied that the plaintiff has proved the will relied upon by him. The evidence produced on behalf of the plaintiff to prove this document consists of the statements of Mohammad Hasan Khan, an attesting witness, and Sakhawat Husain,

the scribe. [His Lordship after considering the evidence proceeded:]

[10] On the whole, I feel satisfied that the decision of the Court below was right and the will has not been proved to be the genuine will left by Dr. Sirajul Hasan.

[11] On the statement made by learned counsel for the plaintiff that there is no other evidence to prove that the sum of Rs. 10,000 was *waqf* property and on my finding that the will is not a genuine document, the admission in the will cannot be relied upon as an admission of Dr. Sirajul Hasan and the plaintiff's case must, therefore, fail. I would, therefore, dismiss this appeal with costs.

[12] As regards First Appeal No. 453 of 1941, this appeal arises out of Suit No. 47 of 1937 which was brought by Syed Zahurul Hasan, appellant, and Mt. Fatima Bibi, respondent against Syed Rahmanul Hasan who was the plaintiff in the other suit. The relief claimed in the suit was that "it may be declared that the plaintiffs are the owners of the houses entered in list (A) annexed to the plaint."

[13] One Dr. Sirajul Hasan was the half brother of the plaintiffs, Zahurul Hasan and Fatima Bibi. He died on 10-3-1937. His wife, Mt. Azizunnisa, had predeceased him in December 1932. In her lifetime on 1-6-1920, she had executed a *waqf alal-aulad*. In the *waqf* she had included houses Nos. 1, 2, 4, 5 and 6 mentioned in list (A). Counsel for both parties are agreed that house No. 3 in list (A) which is described as house with site, previous No. 40 and recent No. 42, situate in *mohalla* Sabzimandi, Allahabad, was not included in the *waqf*. The plaintiffs' case was that these houses which had been purchased on various dates in the name of Mt. Azizunnisa really belonged to Dr. Sirajul Hasan and she had, therefore, no right to make a *waqf* of the same and the *waqf* was invalid. The plaintiffs, therefore, alleged that on the death of Dr. Sirajul Hasan who, they say, was the owner of the property in list (A), the property came by inheritance to the plaintiffs and they became the owners thereof.

[14] Learned counsel for the appellant has relied on the finding of the Court below that the houses were purchased with the money of Dr. Sirajul Hasan and has argued that the law is now well settled that the beneficial ownership in the absence of anything to the contrary vests in the person who provides the purchase money and Mt. Azizunnisa must, therefore, be deemed to be a mere *benamidar*. The defendant's case was that the dower of Mt. Azizunnisa was one lakh out of which she had been paid from time to time about Rs. 50,000 and that it was with this money that she purchased the



houses and rebuilt the same. Learned counsel for the appellant has argued that it was unlikely that a young man in the position of Dr. Sirajul Hasan, who was at the time of his marriage drawing a salary of about Rs. 12 as an assistant in a military hospital, would agree to a dower of a lakh of rupees. Mt. Azizunnisa, according to learned counsel, was the daughter of an *ekka* driver and her mother was a cook in the house of one Zakir Ali. According to the appellant, the marriage took place in 1881 and in support of this contention a document dated 8-11-1881, has been produced. It also mentions that her dower was only Rs. 500. We have looked at the original document and I have no hesitation in agreeing with the finding of the Court below that the document is not genuine. An extract of the service book of Dr. Sirajul Hasan is printed at p. 77 and from that it appears that Azizunnisa was married to him even prior to 9-12-1879. In the *waqf* deed itself to which Dr. Sirajul Hasan was an attesting witness it is mentioned that the dower of Azizunnisa was a lakh of rupees out of which she had been paid from time to time Rs. 50,000. The sale-deeds of all the houses included in list (A) are in the name of Mt. Azizunnisa. They were recorded in the municipal *khasras* in her name. Some of these houses were rebuilt by her and the permission to build was applied for by her and was given to her. Under the *waqf* deed Dr. Sirajul Hasan was appointed as the first *mutwalli* and we have a large number of rent agreements and receipts for house-tax and water-rate in the name of Dr. Sirajul Hasan as *mutwalli*. The plaintiffs are only claiming as heirs of Dr. Sirajul Hasan and the admissions of Dr. Sirajul Hasan and his conduct are evidence against them. I feel satisfied that Mt. Azizunnisa was the owner of the property and Dr. Sirajul Hasan, even if he provided the funds, intended her to be the beneficial owner of the property.

[15] Learned counsel has argued that the *waqf* is bad as the effect of the dispositions was to give the income in substance to the testator's family and the charitable dispositions were illusory. Whatever may have been the position before the Mussalman Waqf Validating Act (6 [VI] of 1913), it is clear now that a *waqf alal-aulad* in which the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman Law as a religious, pious or charitable purpose of a permanent character, is valid. Under this *waqf* deed the *wakif* provided for the maintenance of Nurul Hasan, her daughter's son and his descendants. After Nurul Hasan's line was exhausted, the deed of *waqf* provided that one-

fourth of the income was to be spent for charitable purposes and the rest was to be spent for the maintenance of the descendants of Nasiban Bibi, the sister of the *wakif*, and if no one was left among the descendants of Nasiban Bibi any Hanafi Mussalman could be appointed *mutwalli* and he was to get only ten per cent, as his remuneration and the rest of the income was to be spent towards the education of Muslim children and other charitable objects.

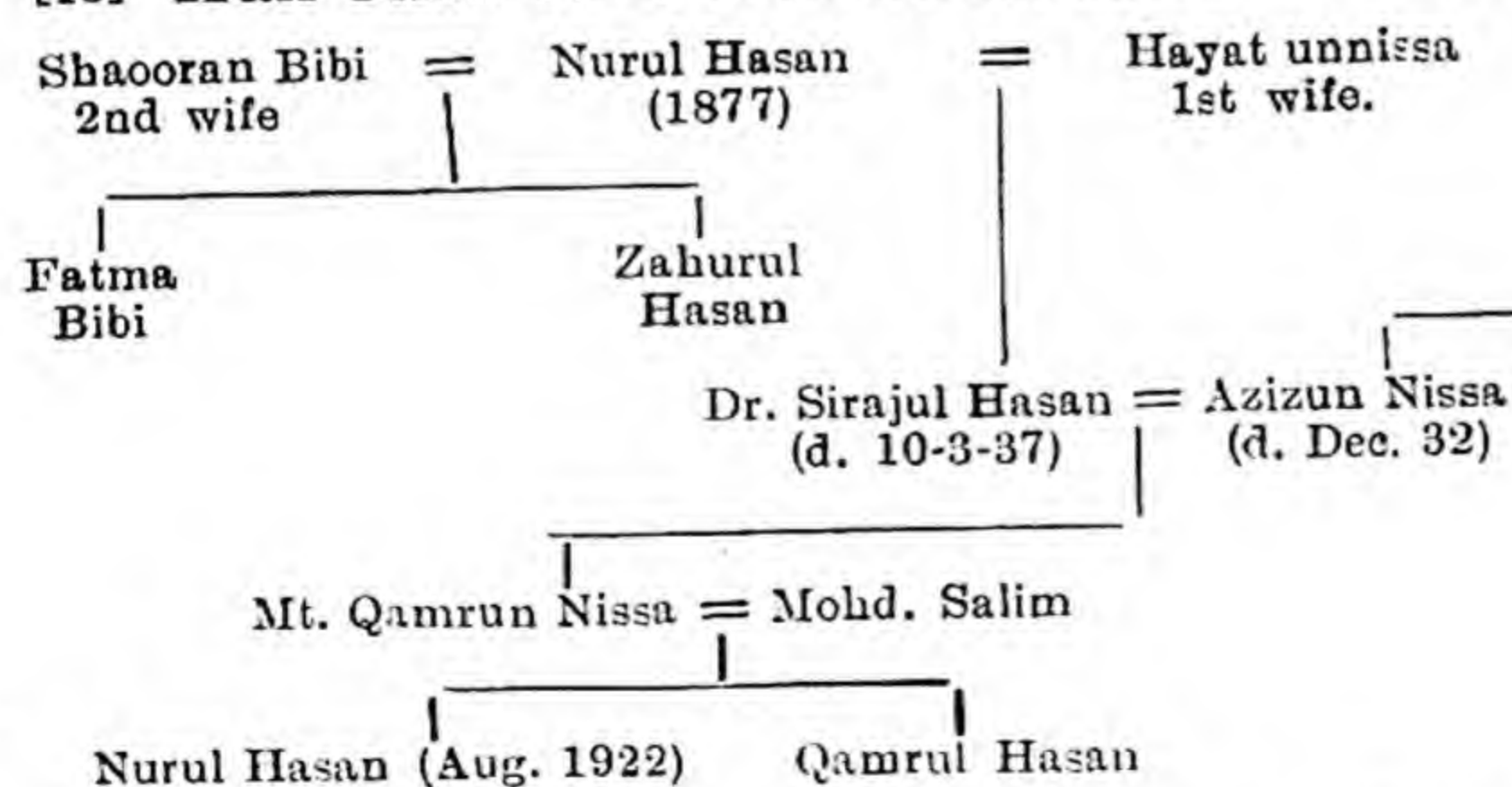
[16] The Mussalman Wakf Validating Act (6 [VI] of 1913) set at rest two points on which there was divergence of opinion before the passing of the Act. Firstly, it settled the question that a Mohamman can make a *waqf* for the maintenance of the members of his family and his descendants, generation after generation, so long as the ultimate benefit is, expressly or impliedly, reserved for the poor or for any other purpose recognised by the Mussalman Law as a religious, pious or charitable purpose of a permanent character. Secondly that it would not invalidate a *waqf* merely because the immediate benefit is to go to the *wakif* or the members of his family, his children or his descendants and the *waqf* would not be illegal on the ground that the effect was to give the property in substance to the testator's family and the *waqf* was illusory.

[17] In the case before us there is no difficulty so far as the dedication for the maintenance of the *wakif*, her husband or her children is concerned. The question is whether Mt. Nasiban and her descendants could be included in the term 'family'. The word 'family' has not been defined in the Act. It is surprising that the Legislature should have used a term which, though in a sense has a well defined meaning, is a term of great flexibility and is capable of any different meanings according to the connection in which it is used. The meaning of the word came to be considered in two cases by this Court, see A. I. R. 1928 ALL. 516<sup>3</sup> and 1930 A.L.J. 109.<sup>4</sup> It is no doubt true that the word 'family' has been interpreted in a very wide sense, but it could not be said that it would include any and every relation by blood or marriage howsoever remote and all their descendants should be included in that term. Though the rule against perpetuities may be inapplicable in the case of the lineal descendants of the *wakif*, I do not think the section was intended to give the same exemption to the descendants or members of his family, generation after generation, and yet unborn. Another question that still remains unsettled is whether it is necessary that the object of the *waqf* should be clearly specified so that the *wakf* may not be vague for uncertainty. Under the Wakf Validating Act the ultimate



benefit must be reserved for the poor or for any purpose recognised by the Mussalman Law as religious, pious or charitable. The rule of English Law ((1804) 10 Ves. 522<sup>5</sup>) that the object of the trust must be certain otherwise the trust would be invalid for uncertainty has been applied by their Lordships of the Judicial Committee to cases of Hindu trusts, (1899) 26 I.A. 71.<sup>6</sup> The question, however, whether the same principles are to be applied to a Muslim *waqf* is not free from doubt. According to Abu Yusuf (*see* Baillies Digest, p. 559, and Hedaya, vol. II, Book XV, p. 341 et seq) even if the object is not expressly mentioned, it may be implied that the *waqf* is for the benefit of the poor. Fatawa Alamgiri has accepted the view of Abu Yusuf in preference to the views of Abu Hanifa and Muhammad. Before the Wakf Validating Act the law had been, more or less, well settled that it was necessary that there should be an express mention of the object of the *waqf* before the *waqf* could be valid. The Wakf Validating Act, however, seems to have accepted the other view as it provides that the ultimate benefit may be expressly or *impliedly* reserved. This question, however, need not be seriously considered in this case as apart from the fact that they were not clearly raised at the Bar, the suit must fail on the ground of S. 42, Specific Relief Act. The plaintiffs were not in possession of the property. They could have and ought to have asked for possession as against the *mutwalli*. They merely claimed a declaration that the property was not included in the *waqf* and the *wakif* had no right to make a *waqf* of such property. The lower Court had rightly held that the suit was barred by S. 42, Specific Relief Act. There is no force in this appeal and I would dismiss it with costs.

[18] **Wali Ullah J.**—I have had the advan-



pect of the position of Zahurul Hasan. The case of Rahmanul Hasan, the plaintiff, in Suit No. 15 of 1937 was that Zahurul Hasan was not an heir to Dr. Sirajul Hasan inasmuch as he (Zahurul Hasan) was born to Shaooran Bibi not by Nurul Hasan but by someone else with whom Mt.

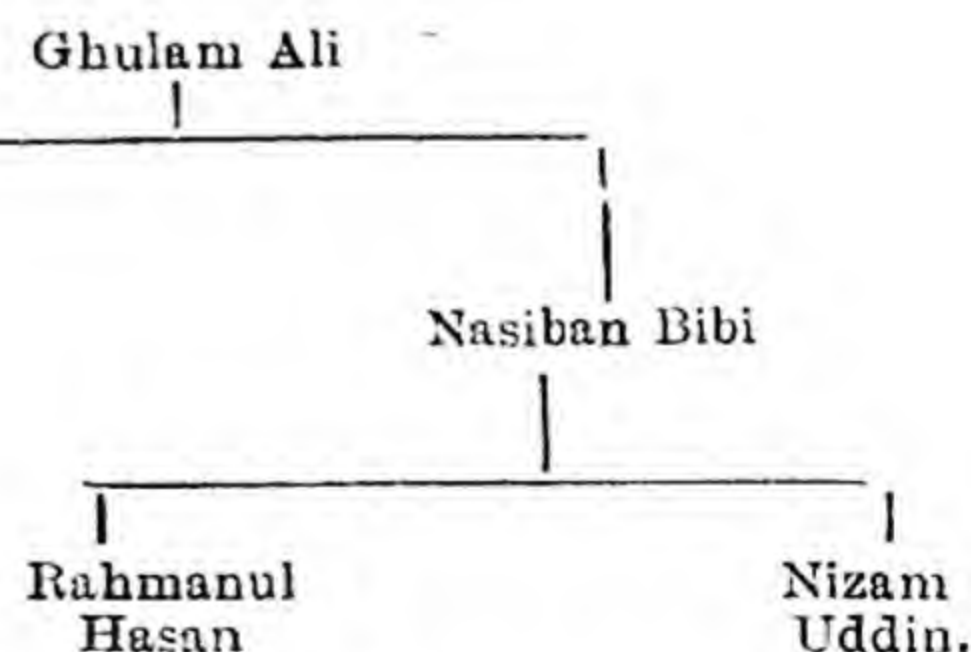
tage of reading the judgment of my learned brother. I regret, however, that I am not able to share his views *re* the genuineness of the will. This appeal has arisen out of Suit No. 15 of 1937 for a declaration that a sum of Rs. 10,000 deposited by one Dr. Sirajul Hasan (now deceased) as *mutwalli* of a *waqf* in the Allahabad Bank on 24-3-1936 forms part of the *waqf* property of which he was the *mutwalli* and that the plaintiff as the present *mutwalli* of the *waqf* was entitled to recover the same from the said Bank.

[19] The *waqf* referred to in the relief was admittedly created by Mt. Azizun Nisa, wife of Dr. Sirajul Hasan, on 1-6-1920 and the deed relating to it is printed at p. 149 of the paper book. It comprises certain house properties which formed the subject-matter of a connected suit—suit No. 47 of 1937 brought by two of the defendants of Suit No. 15 of 1937 against the present plaintiff-appellant in the same Court for a declaration that they were the owners of certain properties as heirs to Dr. Sirajul Hasan who, according to them, was the real owner of those houses and not his wife Mt. Azizun Nisa, who had purported to dedicate the same under the deed dated 1-6-1920.

[20] Both the suits mentioned above were disposed of by the learned Civil Judge by a common judgment and they were both dismissed.

[21] First Appeal No. 377 of 1941 was filed by the plaintiff, Syed Rahmanul Hasan, against the decree passed in Suit No. 15 of 1937. First Appeal No. 453 of 1941, which is a connected appeal was filed by the plaintiff against the decree passed in the later Suit No. 47 of 1937. The relationship of the parties with whom we are concerned will appear from the pedigree set out below:

[22] This pedigree is admitted except in res-



Shaooran Bibi had lived as a mistress. Zahurul Hasan's case, on the other hand, was that he was the son of Nurul Hasan by Mt. Shaooran just as Fatma Bibi was the latter's daughter and, as such he was an heir to Dr. Sirajul Hasan like Fatma Bibi herself.



[23] In the Court below, plaintiff Rahmanul Hasan, who is the appellant in this Court, did not press his plea of Zahurul Hasan's illicit birth nor was this point stressed in this Court by the learned counsel who appeared for him. It may, therefore, be taken that these cases should be dealt with on the footing that the pedigree set out above represents the common case of the parties.

[24] The case of the plaintiff-appellant of Suit No. 15 of 1937 was that Mt. Azizun Nisa, the wife of Dr. Sirajul Hasan, had validly executed a deed of *waqf* on 1-6-1920 in respect of a number of houses (with the exception of house No. 42 (new) of the connected Suit No. 47 of 1937) appointing her husband as the first *mutawalli* and after his death herself as the second *mutawalli* and after her own death her daughter's son Nurul Hasan, as the third *mutawalli*. It was provided that if Nurul Hasan did not leave surviving him any male or female children the children of her own sister Mt. Nasiban Bibi, were to be *mutawallis*. Admittedly Azizun Nisa predeceased her husband, Dr. Sirajul Hasan, and her daughter's son Nurul Hasan had died about ten years before the death of Azizun Nisa, so that on the death of Dr. Sirajul Hasan, which took place on 10-3-1937 Rahmanul Hasan, the plaintiff-appellant, became the next *mutawalli* under the deed of *waqf* in question and he filed the suit No. 15 of 1937 in that capacity. His further allegation was that Dr. Sirajul Hasan on 5-3-1937 had executed a will with regard to his own properties and that he had clearly declared in that will that the sum of Rs. 10,000 deposited by him in the Allahabad Bank formed the income of the *waqf* property and was *waqf*.

[25] In this appeal, we are concerned with the will of Dr. Sirajul Hasan only so far that it may furnish evidence of a declaration by Sirajul Hasan that the amount of Rs. 10,000 belonged to the *waqf* and was not part of the testator's own property. It would for this reason, be wholly unnecessary either to raise the question of the validity of this will under the Mohammedan Law or to pronounce a definite opinion upon the same. It is for this reason that no arguments have been addressed to the Court on that aspect of the matter. The evidence and the circumstances of the case have to be carefully weighed and considered only in so far as they may establish the will as a genuine document in the sense that it was actually executed by Dr. Sirajul Hasan so as to provide evidence of his own admission that the amount in dispute belonged to the *waqf* and was not his personal property.

[26] The defence taken by the two defendants to the suit viz., Zahurul Hasan and Fatma

Bibi, who filed separate written statements, was that the properties covered by the deed of *waqf* had all been acquired by Dr. Sirajul Hasan with his own money, but ostensibly in the name of his wife Mt. Azizun Nisa. He was accordingly the owner of those properties, that the said properties had never been dedicated as *waqf* but were possessed and enjoyed by Dr. Sirajul Hasan as his own personal properties, that the will dated 5-3-1937, had never been executed by Dr. Sirajul Hasan but was a forged document. It was finally asserted that by reason of his mental condition and loss of eye-sight and also on account of the fact that he suffered from death illness (*marzul maut*) he was quite unable to execute a valid will. On these allegations, the defendants claimed the amount of Rs. 10,000 alleged by the plaintiff as *waqf* to be part of the personal assets of Dr. Sirajul Hasan and consequently liable to be inherited by his heirs, i. e., the defendants.

[27] The learned Civil Judge found that the properties covered by the deed of *waqf* had been acquired by the *waqif* named Mt. Azizun Nisa with her own money which she had received from her own husband in part payment of her dower, that the *waqf* was valid and had been acted upon ever since its inception on 1-6-1920, and that it had been acknowledged as such by Dr. Sirajul Hasan himself as the first *mutawalli* under the deed. He further found that the deed of will dated 5-3-1937 relied upon by the plaintiff-appellant was not genuine but a forgery and that in the absence of any other evidence in the light of which the character of a *waqf* could be impressed upon the amount of Rs. 10,000 the same could not be held to be an amount belonging to the *waqf*. In view of these findings, the learned Civil Judge dismissed both the suits with costs as mentioned above.

[28] The arguments of the learned counsel for the parties were confined so far as this appeal is concerned only to the question of the genuineness of the will and they cover not only an examination of certain general circumstances having a direct bearing on that question but also of the actual evidence in the case which is both direct and of a circumstantial nature. No arguments were addressed by the learned counsel for the appellant regarding the question of the alleged illegitimacy of Zahurul Hasan nor were any arguments addressed by the learned counsel for the respondents regarding the alleged mental or physical incapacity of Dr. Sirajul Hasan as affecting the value of the declaration made by him in the deed of will. [His Lordship after considering the evidence and the circumstances of the case and the criticisms of the Civil Judge regarding the same proceeded :]



[29] The criticisms of the learned Civil Judge above referred to are not, in my opinion, sufficient or cogent either to explain away the circumstances which have been pointed out and discussed earlier in this judgment or to adversely affect the testimony of the two classes of witnesses examined by the plaintiff appellant in support of the will relied upon by him. While it is always possible to conceive of hypothetical objections to the genuineness of a particular document on various grounds, the final decision of the issue *viz.*, whether the will was a genuine document or not must depend on the value of the actual evidence produced in the case, the credibility of which must depend on its own intrinsic merit as well as corroboration, if there be any, by other materials on the record and circumstances of the case.

[30] I have dealt with the entire evidence in detail and I have also considered what might be characterised as the circumstantial evidence in the case with care. In my judgment the case of the plaintiff appellant that Dr. Sirajul Hasan executed the deed of will in dispute and therein declared that the sum of Rs. 10,000 in deposit with the Allahabad Bank belonged to the *waqf* was fully established. Before concluding I may mention here that Zahurul Hasan himself admitted in his statement as quoted by the learned Civil Judge in his judgment (at p. 64) that "the income of the property which was included in the *waqf* was also deposited in the Allahabad Bank." A sum of Rs. 10,000 was actually in deposit with the Allahabad Bank, City Branch, at the time of the alleged will as would appear from the Bank Pass-book (Ex. 119) printed at p. 192 of the paper book.

[31] Finally in view of all the circumstances and the evidence discussed above, I unhesitatingly come to the conclusion that the will dated on 5.3.1937, relied upon by the plaintiff appellant was a genuine will executed by Dr. Sirajul Hasan, that the sum of Rs. 10,000 which is the subject-matter of Suit No. 15 of 1937 was acknowledged by the testator as money belonging to the *waqf*.

[32] I now take up the connected appeal No. 453 of 1941 filed by Syed Zahurul Hasan against Rahmanul Hasan impleading Mt. Fatma Bibi, plaintiff 1, as a *pro forma* respondent. This appeal arises out of a suit No. 47 of 1937 filed by the appellant and the said *pro forma* respondent against Rahmanul Hasan for a declaration that the plaintiffs were the owners of the houses detailed at the foot of the plaint. Their allegations, as has been briefly stated, earlier in this judgment, were that Dr. Sirajul Hasan had acquired these houses with his own money ostensibly, in the name of his wife Mt. Azizun Nisa

and that he was and remained throughout his life the owner of those houses, that the deed alleged to be a deed of *waqf* executed by this lady had neither been intentionally executed by her nor had she any right to execute the same and that the *waqf* had never been acted upon but that the income from the property was always treated as belonging to Dr. Sirajul Hasan, the husband of the executant. The plaintiffs claimed the reliefs as heirs of Dr. Sirajul Hasan. There was a further allegation in the plaint that Dr. Sirajul Hasan having originally contracted intimacy with Azizun Nisa subsequently married her on what is known as *Sharai* dower, the amount of which later on was specified by the plaintiffs as Rs. 500 only.

[33] The respondent Rahmanul Hasan denied these averments in his defence and pleaded that Mt. Azizun Nisa had been from the very beginning the lawful wife of Dr. Sirajul Hasan, that her dower was one lac of rupees as admitted by Dr. Sirajul Hasan himself, that out of this the latter had paid fifty thousand rupees on different occasions to his wife, that the properties in dispute had been acquired with this money from time to time by the lady herself, that she was thus their absolute owner, that she had validly and rightfully executed a deed of *waqf* on 1.6.1920, appointing herself as the first *mutwalli* and that the husband had up to his death on 10.3.1937, acted and acknowledged his position as such. He further pleaded that the *waqf* had been fully acted upon and that the plaintiffs were not entitled to claim the property as heirs of Dr. Sirajul Hasan. There was a further plea that Zahurul Hasan plaintiff, not being the son of Nurul Hasan, father of Dr. Sirajul Hasan could not be an heir to Mr. Sirajul Hasan. This last plea appears to have been abandoned in the Court below and was not pressed in this Court also.

[34] The learned Civil Judge accepted the case of the defendant Rahmanul Hasan on all the above points except the last and dismissed the suit with costs. [His Lordship after considering the deed of *waqf* and other evidence proceeded:]

[35] In view of the facts set out above, we find ourselves in complete agreement with the learned Civil Judge that Mt. Azizun Nisa was not the owner of the properties dealt with by her under the deed of *waqf* in question, that she had willingly and rightfully executed that document which was duly enforced and acted upon, that the plaintiffs were not entitled to claim those properties as heirs of Dr. Sirajul Hasan.

[36] In view of all that has gone before I would allow First Appeal No. 377 of 1941 and



set aside the judgment and decree of the Court below in Suit No. 15 of 1937. I would decree the claim of the plaintiff appellant Rahmanul Hasan who will be entitled to his costs in both the Courts from the defendant-respondents who will bear their own costs. For the same reasons I would dismiss First Appeal No. 453 of 1941 with costs.

[37] **Allsop J.** — The suit which has given rise to this appeal was filed by Rahmanul Hasan, the *mutwalli* of a *waqf* in order to obtain a declaration that a sum of Rs. 10,000 in deposit in the Allahabad Bank was *waqf* property. The previous *mutwalli* was Sirajul Hasan. He deposited the money on 24-3-1936, in his own right and not on behalf of the *waqf*. The defendants, Zahurul Hasan and Mt. Fatma, were the children of Nurul Hasan by his second wife, Mt. Shauran Bibi. Sirajul Hasan was the son of Nurul Hasan by his first wife, Hayat-un-nisa. Rahmanul Hasan's suit was dismissed by the trial Court. He appealed to this Court. When the appeal came before a Bench of two Judges, the learned Judges disagreed and they have consequently referred a question to me for my opinion.

[38] The main, if not the only evidence that the sum of Rs. 10,000 belonged to the *waqf* was a statement contained in a will alleged to have been executed by Sirajul Hasan on 5-3-1937. The trial Court held that the execution of this will was not proved. In appeal one of the learned Judges agreed with the trial Court and the other came to the conclusion that the will had been executed by Sirajul Hasan as alleged by the plaintiff-appellant. The question referred to me is:

"Is the will (*wasiyatnama*) dated 5-3-1937 a genuine document executed by Dr. Sirajul Hasan?"

Sirajul Hasan died on 10-3-1937, five days after the will is alleged to have been executed. He was about seventy-nine years of age at that time. His wife, Mt. Azizunnissa, and his daughter, Mt. Qamrunnissa, were also dead. Mt. Qamrunnissa had married a man called Muhammad Salim who was alive. Sirajul Hasan's deceased wife had a sister Mt. Nasiban, who had two sons, the plaintiff, Rahmanul Hasan and a man called Nizam Uddin *alias* Munne. Zahurul Hasan and Mt. Fatma were Sirajul Hasan's heirs under the Muhammadan law, but Zahurul Hasan and Sirajul Hasan had been on bad terms for a number of years. Sirajul Hasan had not been very well for a considerable time. He was suffering from some heart trouble and some form of indigestion, but the evidence of some of the witnesses produced by the plaintiff was that he was not bed-ridden and had in fact visited some patients two or three days before

he died. He was apparently a qualified doctor who was well known in Allahabad. [His Lordship after considering the evidence and circumstances of the case came to the conclusion that there were causes for suspicion about the validity of the will and proceeded:]

[39] On the whole I am satisfied that the learned Judge of the trial Court was perfectly justified in refusing to accept the evidence that the will had been executed. Considerable argument was addressed to me on the points which I have mentioned and it was urged that all these causes for suspicion were not sufficient to justify the finding that the will was not genuine, but I must point out that it is not necessary to arrive at such a finding. If it was necessary to prove as a positive fact that the will was a forgery, as would be the case in a criminal trial, it might well be argued that causes for suspicion are not sufficient grounds of proof, but this is a case where the burden of proof is on the plaintiff. He had to prove that there was no reasonable doubt that the will had in fact been executed by Sirajul Hasan.

[40] In my judgment the matter is at least open to very grave doubt and, therefore, my answer to the question which has been put to me is that the execution of the will is not proved. My finding may be put before the Bench which has referred the question.

[41] **By the Court.**—In view of the decision of the learned third Judge that the will relied upon by the plaintiff has not been proved according to law this appeal must fail and it is, therefore, dismissed with costs.

V.R.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 288 [C. N. 114.]**

ALLSOP AND SINHA JJ.

*Sahu Shib Shakti Saran and another — Defendants—Appellants v. Piarey Lal and others—Respondents.*

First Appeal No. 203 of 1943, Decided on 7-10-1946 from decree of First Civil Judge, Meerut, D/- 9-1-1943.

(a) Hindu law — Will—Construction—Testator devising all his property to his wife with rights of transfer as absolute owner—Power to adopt any boy she likes given by will — Subsequent addition of clause to will prohibiting widow from adopting boys from particular families and taking away her power of gift—Widow allowed to alienate property only in case of necessity — On construction, will held to confer a Hindu widow's estate on wife of testator.

A Hindu who had died in the year 1898 leaving behind him his two widows executed a will in 1877 which provided as follows: "After my death my second wife K shall be the absolute owner in possession of the entire immovable and movable property belonging to me with a right to sell, mortgage, make a gift of and transfer it otherwise. I authorise K to adopt when she wishes, after my death, any boy whom she likes. After



making an adoption, neither *K* nor the adopted son shall have any power to make a transfer of my property during the lifetime of *K*. *K* shall act as the guardian of the adopted son till he comes of age and during his minority shall have power to carry on the management of the property. After the attainment of majority by the adopted son, he and *K* shall have power to carry on the management and to enjoy the income of the property either jointly or in equal shares." The will further provided that in the event of death of the first adopted son *K* was to have power to adopt a second or third son.

In the year 1896 the testator added the following clause to the will: "Further it is stipulated that if *K* should wish to adopt a son, she shall not adopt any one of the relations of her family or of that of *B*. If my brother *J*, should give his son in adoption she should adopt him, otherwise she should adopt some other boy, and she shall not have power to make a gift. In case of necessity *K* shall have power to sell or mortgage a portion of the property."

*Held* that the will and the codicil, read as a whole clearly indicated the intention of the testator to confer a Hindu widow's estate on his wife *K*. No doubt the testator when he executed the will in 1877 intended to confer an absolute estate upon his wife only to be affected by the legal result of the adoption on which he was equally insistent, but he changed his mind subsequently and wanted to cut down that estate by seeing that the widow did not defeat his intention by transferring the property to a boy belonging to one of the prohibited families or by practically nullifying the effect of a valid adoption by unwarranted alienations. The provision for alienation, in case of necessity was one indication that it was the testator's intention to create a Hindu widow's estate: 23 A. I. R. 1936 All. 50, *Approved*; *Case law referred*. [Paras 9A, 19 and 20]

(b) Hindu law — Adoption — Widow — On adoption by widow estate vests in son from date of adoption — But any prior alienation made by her and authorised by testator is not affected by such adoption.

Once an adoption is made by the widow it either refers back to the date of the death of the adoptive father or takes effect at least from the date of adoption and from that date the estate ceases to belong to the widow but vests in the son and the will ceases to speak or operate but till that date the widow retains her proprietary interest in the estate. Indeed, if she has made a disposition, authorised by the testator, prior to adoption, the adoption will not affect the validity of that alienation: 20 A. I. R. 1933 P. C. 155; 5 Bom. 48 (P. C.); 14 A. I. R. 1927 All. 387 and 14 A. I. R. 1927 P. C. 139, *Rel. on*. [Para 17]

#### Cases referred:—

1. ('31) 1931 A. L. J. 555 : 18 A. I. R. 1931 P. C. 179 : 59 Cal. 142 : 58 I. A. 270 : 134 I. C. 648 (P. C.), *Sarajubala Debi v. Jyotirmoyee Debi*.
2. ('35) 1935 A. L. J. 1133 : 22 A. I. R. 1935 P. C. 187 : 157 I. C. 888 (P. C.), *Rameshwar Bakbsh Singh v. Balraj Kaur*.
3. ('32) 59 Cal. 859 : 19 A. I. R. 1932 Cal. 600 : 138 I. C. 882, *Basanta Kumar Basu v. Ramshankar Ray*.
4. ('74-75) 2 I. A. 7 : 14 Beng. L. R. 226 : 3 Sar 405 (P. C.), *Mahomad Shumsool v. Shevak Ram*.
5. ('34) 1934 A. L. J. 1013 : 22 A. I. R. 1935 All. 43 : 152 I. C. 387, *Mt. Sheoraji v. Ram Sawari Debi*.
6. ('33) 1933 A. L. J. 710 : 20 A. I. R. 1933 P. C. 155 : 12 Pat. 642 : 60 I. A. 242 : 143 I. C. 441 (P. C.), *Amarendra Man Singh v. Sanatan Singh*.
7. ('80) 5 Bom. 48 : 7 I. A. 181 : 4 Sar. 73 (P. C.), *Lakshman Dadanaik v. Ramchandra*.

8. ('20) 18 A. L. J. 503 : 7 A. I. R. 1920 All. 116 : 42 All. 461 : 58 I. C. 667 (F. B.), *Lalta Prasad v. Sri Mahadeoji Birejman Temple*.

9. ('27) 25 A. L. J. 338 : 14 A. I. R. 1927 All. 387 : 49 All. 579 : 101 I. C. 678, *Durgi v. Kanhaiya Lal*.

10. ('27) 25 A. L. J. 945 : 14 A. I. R. 1927 P. C. 139 : 50 Mad. 508 : 54 I. A. 248 : 101 I. C. 779 (P. C.), *Krishna Murthi v. Krishna Murthi*.

11. ('36) 23 A. I. R. 1936 All. 50 : 160 I. C. 617, *Mt. Chhatarpati v. Mt. Kalap Dei*.

*G. S. Pathak and S. N. Seth*—for Appellants.

*N. C. Vaish and C. B. Agarwala*—for Respondents.

**Allsop J.**—This appeal arises out of a suit in which the plaintiffs sought to obtain possession of certain property of which the original owner was one Nand Kishore, who died in the year 1850. This man left him surviving a widow, Mt. Bhawan Kuer, who adopted a boy called Ram Saran Das as a son in the year 1877. Ram Saran Das executed a will on 6-12-1877. He died about the year 1898 leaving him surviving two widows, one of whom was Mt. Kalawati. In 1918 Mt. Kalawati was said to have adopted a son, Dharam Prakash, relying upon a power to adopt given her by the will. In 1924 a suit was instituted by Mt. Kalawati in order to obtain a declaration that there had been no adoption and, if there had been an adoption, it was invalid. The trial Court passed a decree in Mt. Kalawati's favour and this was ultimately upheld by their Lordships of the Privy Council in 1933. Mt. Kalawati died in 1935, having in the meanwhile transferred the property in suit to some of the defendants. The plaintiffs instituted the suit which has given rise to this appeal on the allegations that they were the nearest reversioners of Ram Saran Das and that Mt. Kalawati had no power to alienate the property. The learned Civil Judge has passed a decree in their favour.

[2] One of the allegations which was made in the trial Court by the defendants was that the plaintiffs were not the nearest reversioners of Ram Saran Das. The learned Civil Judge decided this issue against the defendants; one of the grounds of this appeal is that this decision was wrong, but learned counsel for the appellants has not been able to adduce any arguments in support of this contention. There was ample evidence to support the finding of the learned Civil Judge and we have not been shown any reason why we should come to the conclusion that he was in error upon this point.

[3] The other question which arose in the Court below and which has arisen in this appeal is whether Mt. Kalawati had any power to alienate the property. The answer to this question depends upon the interpretation of the will executed by Ram Saran Das.

[4] Clause 1 of the will is in the following terms:

"After my death, my second wife, Mt. Kalawati,



shall be the absolute owner in possession of the entire immovable property specified at the foot of this will and of the entire movable property and household furniture, jewellery and clothes, hard cash and debts etc., all that I have or which belongs to me. In other words, Mt. Kalawati shall have absolute proprietary right and power with respect to the entire property together with the right to sell, mortgage, make a gift of and transfer it otherwise, as an absolute male owner has."

[5] Clauses 2 and 3 dealt with the right of the testator's mother and first wife to receive certain allowances in lieu of maintenance and their right to reside in a certain house.

[6] Clause 4 was in the following terms :

"I authorize Mt. Kalawati to adopt when she wishes, after my death, any boy whom she likes. After making an adoption, neither Mt. Kalawati nor the adopted son shall have any power to make a transfer of my property during the lifetime of Musammât Kalawati. Mt. Kalawati shall act as the guardian of the adopted son till he comes of age and during his minority shall have power to carry on the management of the property. After the attainment of majority by the adopted son, he and Mt. Kalawati shall have power to carry on the management and to enjoy the income of the property, either jointly or in equal shares."

[I have made some grammatical corrections in our translation of the will but the substance is as stated by the translator.]

[7] Clause 5 authorised Mt. Kalawati to adopt a second or a third son in the event of the death of the first adopted son.

[8] These parts of the will were drafted by the testator in his own handwriting and signed by him on 6.12.1896. He made an addition, also in his own handwriting on 10.12.1896, on which date he signed the will and his signature was attested by three witnesses, namely, T. N. Ghosh, a retired Assistant Surgeon, Raghubir Saran, a Pleader, and Daya Nath who appears to have been a Munsif. This addition is in the following terms :

"Further it is stipulated that if Mt. Kalawati should wish to adopt a son, she shall not adopt any one of the relations of her family or of that of Mt. Basanti (the second widow) or Bhawan Kuer. If my brother, Jiwan, should give his son into adoption, she should adopt him, otherwise she should adopt some other boy, and she shall not have power to make a gift. In case of necessity Mt. Kalawati shall have power to sell or mortgage a portion of the property."

The question is whether the executor of this will intended to create an absolute estate of inheritance in favour of Mt. Kalawati and afterwards attempted to restrict her power of alienation or whether he intended to create in her favour a Hindu widow's estate. The learned Civil Judge has held that he intended to create a Hindu widow's estate when he made the addition to the will on 10th December. It is contended by learned counsel for the defendants-appellants that he intended to create an absolute estate in favour of Mt. Kalawati subject to disfeance

on the adoption by her of a son and that the restrictions on the power of alienation were intended to operate only when and if the adoption took place.

[9] There is always a difficulty in interpreting wills drawn up by those who are not experts and this difficulty is enhanced in India where there is so little difference between the creation of a Hindu widow's estate and an attempt to create an absolute estate with restrictions upon the power of alienation. If the first clause in the will stood by itself there could be no doubt whatsoever that Mt. Kalawati was granted an absolute estate of inheritance and the provisions of the fourth clause might be interpreted as provisions for the disfeance of the estate in the event of adoption, but the will must be read as a whole and the later provisions must be given preference if they are inconsistent with the earlier ones. It seems to me that Ram Saran Das had changed his mind by 10th December when he inserted the last clause in the will. By the fourth clause he had given Mt. Kalawati an absolute discretion in the matter of adoption, but in the last clause he restricted her powers. He obviously wished her to adopt the son of his brother, Jiwan, that is, his natural brother, if Jiwan would allow her to do so. He certainly intended she should not adopt any of her own relations or the relations of Mt. Basanti or Bhawan Kuer. Her adoption of Dharam Prakash was held to be invalid on the ground that this man was a relation of her own and that she had no authority to adopt him. By this last clause the testator also took away Mt. Kalawati's power of alienation. He said specifically that she would have no power to make a gift and I think that this was a necessary corollary to his injunction that she should not adopt relations of her own, because if she had a power of gift, she could defeat the intentions of the testator by making a gift to one of those relations without making any adoption or before she had made an adoption. The final clause that she should have power to sell or mortgage in case of necessity is a power which is the ordinary concomitant of a Hindu widow's estate. The question of inheritance to the property did not seriously arise because Mt. Kalawati had no daughter or grand-daughter and her stridhan, even if she had an absolute estate, would pass by inheritance to the heirs of her late husband, Ram Saran Das, just as they would pass to his reversioners if she had a Hindu widow's estate. Learned counsel for the appellants has urged very strongly that the first clause is quite clear and that the last clause which was inserted on 10th December was meant not to modify that clause but merely to modify the provisions of the



fourth clause which related to adoption and its results. I think however, that we must interpret the will as a whole and it seems quite clear that the executor before he executed the will had decided that Mt. Kalawati should not alienate the property except as a Hindu widow might, that is, for necessity. His strongest wish seems to have been that she should adopt a son to him. This is to be deduced from the fact that he gave her power to adopt not one boy but three boys in succession if necessity arose.

[9A] Before he finally executed the will he seems to have realised that this wish of his to have an adopted son might easily be defeated if Mt. Kalawati had the full power of alienation which was allowed to her by the first clause of the will. Learned counsel for the appellants would interpret the will to mean that Mt. Kalawati was to have an absolute estate with full power of alienation if she made no adoption, but I do not think that this interpretation is consistent with the last clause inserted on 10th December. If an adoption was made under the fourth clause that would in itself defeat the absolute estate and there would be no question of Mt. Kalawati's making any alienations thereafter. I think that the provision that she should make no gift must apply to the period before an adoption took place and, as I have already explained, I think the reason is that the executor by giving Mt. Kalawati the power to make a gift might well have defeated his intention that her relations or those of the other women should not benefit from his property. It seems not improbable that he had on the date of the execution of the will the advice of a pleader and a Munsif who had some knowledge of law and that they suggested that the clause then inserted would more clearly express his intentions. It is, of course, not necessary that a witness should know the contents of a will but in this country I think it is a common practice for witnesses not only to attest the signature of the executant of a document but also, in some measure to express approbation or confirmation of its terms. Even if that were not so, it is at least obvious that there were two persons, learned in the law, who were available for consultation and it is not at all improbable that the testator consulted them. It is not unlikely that they suggested to him that there should be some provision for alienation, if it was really necessary in the interest of the estate. I think the provision for alienation in case of necessity is one indication that it was the testator's intention to create a Hindu widow's estate. Learned counsel has suggested that term 'necessity' was used instead of the term 'legal necessity' and that this indicates that the estate was not intended to be a Hindu

widow's estate, but I do not think there can be any such thing as an illegal necessity. A particular action may be necessary or unnecessary. An alienation for necessity according to law is an alienation which must or should be made. If it need not be made, then there is no necessity at all. I think that the testator meant to give Mt. Kalawati the power of alienation which is ordinarily given to the holder of a Hindu widow's estate, that he did not mean her to have any other power of alienation and that he contemplated the adoption of a son by her to him. If he was anxious, as he seems to have been, that a son should be adopted, that adoption might take place at any time while Mt. Kalawati was alive and he would not have wished her in the meanwhile to alienate the estate. There was therefore no object after he had restricted her powers of adoption and alienation in his giving her an absolute estate. As I have already said, it made no difference in the matter of inheritance whether she had an absolute estate or a limited estate. I agree with the learned Civil Judge that the last clause in the will justifies the conclusion that the testator when he executed the will really intended that Mt. Kalawati should have a Hindu widow's estate till such time as she adopted a son.

[10] I certainly see no reason for coming to the conclusion that the learned Civil Judge was wrong and I would, therefore, dismiss the appeal with costs.

[11] **Sinha J.**—I agree with my learned brother in the order proposed. In view of the importance of the question I desire to add a few words.

[12] It is true that the expression used in the deed is "*malik*" and, on 6.12.1896, the lady is given the right "to sell, mortgage, make a gift of and transfer it otherwise, as an absolute male owner has." But this is not a case where, on the same day, *i.e.* on 6.12.1896, something was added which cuts across the earlier recitals. The law is clear that, if two clauses come in conflict with each other, the later shall prevail. But the position here is, if possible, clearer.

[13] It cannot be denied that it was open to the testator to change his mind and draw up another will on a later date. This evidently he did, but, instead of executing a fresh deed, he executed a sort of a codicil and, if the latter evidences an intention which militates against the one previously expressed, the later in time must prevail.

[14] A large number of authorities have been cited by the learned counsel for the appellants. Particular reliance has been placed upon 1933 A.L.J. 555,<sup>1</sup> 1935 A.L.J. 1133,<sup>2</sup> and 59 Cal. 859.<sup>3</sup>



[15] As my learned brother points out, the cardinal question is the intention of the testator. It is not possible to have two deeds couched in identical language or two cases exactly parallel. There is no doubt that, if the word "malik" alone is used, an absolute estate is intended, but, where there are other words used, the whole of the will has to be read and construed.

[16] There is yet another circumstance which must also be kept in view. It is a will executed by a Hindu in favour of his wife. It was held so far back as the year 1874 by their Lordships of the Judicial Committee in 2 I. A. 7<sup>4</sup> that :

"it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property" and

"it may be assumed that Hindu knows that, as a general rule, at all events, women do not take absolute estate of inheritance which they are enabled to alienate."

This principle was explained and followed by a Bench of this Court in 1934 A. L. J. 1013.<sup>5</sup>

[17] On 6-12-1896, Ram Saran Das had provided for an absolute estate in favour of his wife. He had equally emphatically provided for an adoption. Indeed, he laid unusual stress on it and provided for successive adoptions in the event of the failure of one or more such adoptions. It will not be wrong to hold that on this day he was anxious to pass an absolute estate to his wife and also to ensure his line by means of an adoption. The only limitation upon the wife's estate was that created by an adoption. Once an adoption is made, it either refers back to the date of the death of the adoptive father or takes effect at least from date of adoption. As held by Sir George Lowndes in 1933 A. L. J. 710<sup>6</sup> at p. 713:

".....the adopted son is.....clothed with all the attributes of a son, and is from the date of his adoption regarded as having been born in his adoptive family,"

and from that date the estate ceases to belong to the widow but vests in the son and the will ceases to speak or operate *vide* 5 Bom. 48<sup>7</sup> and explained in 18 A. L. J. 503,<sup>8</sup> but till that date the widow retains her proprietary interest in the estate. Indeed, if she has made a disposition, authorised by the testator, prior to adoption, the adoption will not affect the validity of that alienation: *vide* 25 A. L. J. 338<sup>9</sup> and 25 A. L. J. 945.<sup>10</sup>

[18] We can, therefore, assume that, on 6-12-1896, the dominant intention was that an absolute estate should be conferred upon Mt. Kalawati, subject only to the result of the adoption. But it appears that he changed his mind either on further consideration or as a result of the influence of his friends. The deed is attested by a lawyer, Raghubir Saran, and a Munsif,

Daya Nath, and it may be that these two largely influenced his mind. By the 10th he changed his mind. He was anxious for an adoption, but he was equally anxious that the field should be restricted. Mt. Kalawati was not to take a boy in adoption from the families of Mt. Basanti or Bhawan Kuar or even her own. The first choice was to be made from the family of his brother, Jiwan, and in the event of his refusal she could take other boys in adoption. It must have occurred to him that he should also restrict her right of alienation. He must have thought that it was no use directing an adoption and leaving the boy adopted to her tender mercy or that the object of restricting the field should be defeated by the lady by making a gift in favour of a child of the prohibited family, even if he was not taken in adoption. It is remarkable that this codicil or the post script is in the hands of Ram Saran Das himself.

[19] It is, therefore, obvious that the codicil which must control the will, represents the true intention of the testator, which was to cut down the right given on the 6th and to convert it into what is legally known as a Hindu widow's estate. The view which I have taken is in accord with that taken in A. I. R. 1936 ALL. 50,<sup>11</sup> a case to which my brother was a party. I have ventured to refer to it as the language used in the deed is practically the same as the one used in the case before us. Say the learned Judges :

"(a) The term "malik" is not a term of art. Its real significance should be considered in the light of the setting in which it occurs. If there is nothing in the context to indicate a contrary intention, the word "malik" certainly denotes full ownership; but it is consistent with a limited estate if it is controlled by other clauses in the will."

(b) A will should be construed as a whole, and a particular clause in which the words "permanent owner" occur should not be taken as standing by itself and record a finding that an absolute estate has been conferred upon the legatee and then pass on to other clauses which indicate the contrary and reject them on the ground that they are repugnant to the earlier clause or that they merely express pious wishes of the testator.

(c) In considering a will too great stress should not be laid on any particular word and due allowance should be made in construing the will for the circumstances in which it was drawn up and executed."

[20] The will and the codicil, read as a whole, clearly indicate the intention of the testator that while, on 6th December, he intended to confer an absolute estate upon his favourite wife only to be affected by the legal result of the adoption on which he was equally insistent; he changed his mind by 10th December and wanted to cut down that estate by seeing that the widow does not defeat his intention by transferring the property to a boy belonging to one of the prohibited families or by practically nullifying the effect of a valid adoption by unwarranted alienations. I



am, therefore, of opinion that the view taken by the Court below is right and that the appeal should be dismissed.

**By the Court.**—The appeal is dismissed with costs.

K.S.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 293 [C.N. 115.]**

SINHA J.

*Madan Mohan Lal—Defendant-Appellant v. Laxmi Narain — Plaintiff and others — Defendants—Respondents.*

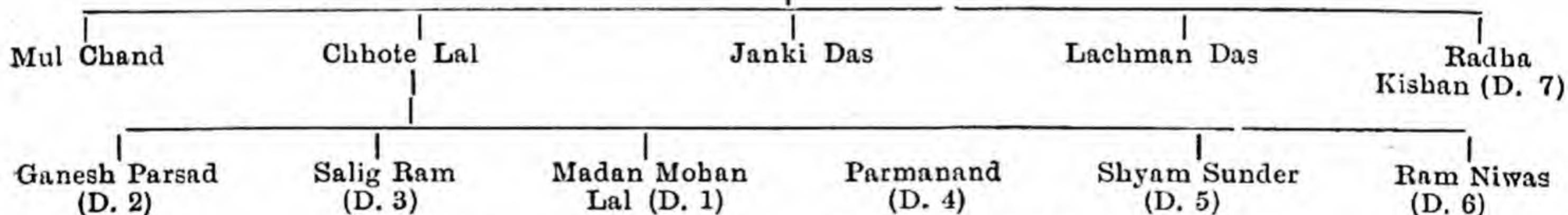
Second Appeal No. 1526 of 1945, Decided on 11-12-1946, from decision of District Judge, Farrukhabad, D/- 4-7-1945.

Provincial Insolvency Act (1920), S. 60 — *R*, a member of Hindu family and in possession of revenue paying grove adjudicated insolvent—During pendency of appeal by creditor against adjudication, Official Receiver selling property to *P* when declaration contemplated by S. 60 was in force — Adjudication subsequently annulled and *R* withdrawing amount of sale consideration — Sale held not void but voidable — *R*'s ratification of it was good against other members also.

One *R*, a member of Hindu family was in possession of a revenue paying grove. He was adjudicated an insolvent. During the pendency of an appeal by a creditor against this order the Official Receiver sold the grove to *P* at a time when the declaration contemplated by S. 60 of the Provincial Insolvency Act had been made by the Provincial Government. The insolvency was subsequently annulled and *R* withdrew the amount of the sale consideration. It was contended that the sale by the Official Receiver in favour of *P* was void as it was made when the declaration contemplated by S. 60, Provincial Insolvency Act was in force:

PREM RAJ.

Makhan Lal.



[2] The family was a family of businessmen and carried on business in the name of Prem Raj Makhan Lal. The facts are these: In 1915 Janki Das purchased the grove in dispute from one Maggu Khan and died either in 1927 or the beginning of 1928. It appears that Radha Kishan, his brother, obtained possession of this grove. He was adjudicated an insolvent on 11-4-1932. This order was challenged on appeal by some creditor and on 5-11-1932, the District Judge remitted an issue for a finding whether the firm was a joint family firm. During the pendency of the appeal the Official Receiver on 28-7-1933, sold the grove in dispute to one Pitam Lal, who is the grandfather of the present plaintiff. On

Held that the sale was bad not in the sense that it was void, but in the sense that it could be avoided. It was open to *R* to avoid it and it was also open to him to accept it. He elected to follow the latter course by withdrawing the amount of the sale consideration. The ratification was, therefore, a good ratification not only *qua R* but also *qua* the other members of his family who never repudiated it by any of the methods known to law: 30 A. I. R. 1943 P. C. 29 (P. C.), *Rel. on.*

[Paras 14 and 16]

*Cases referred:—*

1. ('34) 1934 A. L. J. 859 : 21 A. I. R. 1934 All. 314 : 151 I. C. 244, Narotam Das v. Bhagwan Das.
2. ('31) 1931 A. L. J. 400 : 18 A. I. R. 1931 All. 541 : 132 I. C. 568, Sarju Prasad v. Ramsaran Lal.
3. ('03) 30 Cal. 539 : 30 I. A. 114 : 8 Sar. 374 (P. C.), Mohori Bibee v. Dharmodas Ghose.
4. ('37) 1937 A. L. J. 688 : 24 A. I. R. 1937 All. 610 : I. L. R. (1937) All. 860 : 170 I. C. 934 (F.B.), Ajudhia Prasad v. Chandan Lal.
5. ('43) 1943 A. L. J. 421 : 30 A. I. R. 1943 P. C. 29 : 18 Luck. 130 : I. L. R. (1943) Kar. P. C. 19 : 70 I. A. 1 : 206 I. C. 457 (P.C.), Mohan Manucha v. Manzoor Ahmad Khan.
6. ('19) 46 Cal. 183 : 5 A. I. R. 1918 P. C. 168 : 14 N. L. R. 181 : 45 I. A. 219 : 48 I. C. 312 (P. C.), Gaurishankar Balmukund v. Chinnuniya.
7. ('92) 19 Cal. 123 : 18 I. A. 158 : 6 Sar. 91 (P. C.), Hanuman Kamat v. Hanuman Mandur.
8. ('23) 21 A. L. J. 608 : 11 A. I. R. 1924 All. 51 : 45 All. 654 : 74 I. C. 931, Jageshwar Pande v. Deodat Pande.

*C. B. Agarwala* — for Appellant.*B. R. Avasthi* — for Respondents.

**Judgment.** — This is a defendant's appeal and arises out of a suit for possession of a grove, for mesne profits amounting to Rs. 115 and also for a sum of Rs. 60 on account of the price of timber wrongfully cut by the defendants. The following genealogical table will be helpful

18-8-1933, the learned Insolvency Judge found that there was no joint family and on 15-9-1933, the District Judge annulled the insolvency.

[3] The plaintiff, who is the grandson of the purchaser, brought a suit for the reliefs mentioned above, on the allegation that he was in peaceful possession of the property upto 1942 but was disturbed in the month of April of that year.

[4] The defence was that the sale by the Official Receiver was a void sale inasmuch as it was made at a time when the declaration contemplated by S. 60, Provincial Insolvency Act had been made by the Local Government and no title passed to the plaintiff's grandfather. The plaintiff's possession upto 1942 was also denied.



[5] The learned Munsif found in favour of the defendants and dismissed the suit. The learned District Judge acceded to the defence only in so far that the sale was a void sale, but held that Radha Kishan had, by his conduct having withdrawn a sum of Rs. 1675, which was the sale consideration, after the annulment of the insolvency estopped himself from challenging the sale and that estoppel affected not only him but all the defendants. In the result he decreed the suit. One of the defendants has come to this Court in second appeal.

[6] The learned counsel for the appellant contends that, on the finding that Radha Kishan was a member of a joint Hindu family with the defendants and on the further finding that the grove was a revenue paying grove and the declaration made by the Local Government was in force, there was no answer to the defence.

[7] The learned counsel for the respondent does not concede that the grove in dispute is a revenue paying grove, but I am bound by the finding of fact recorded by the learned District Judge that it is a revenue paying grove and shall proceed upon that assumption. Section 60, Insolvency Act, runs thus :

60 (1) "In any local area in which a declaration has been made under S. 68, Civil P. C. 1908, and is in force, no sale of immovable property paying revenue to the Government or held or let for agricultural purposes shall be made by the Receiver, . . . . ."

This section is intended to achieve the same end as S. 68, Civil P. C.

[8] The learned counsel for the appellant relies upon 1934 A. L. J. 859.<sup>1</sup> That was the case of a sale of agricultural land under the orders of the civil Court at a time when the Governor-in-Council had, acting under S. 68, Civil P. C. declared that :

"The executions of decree in cases in which a civil Court has ordered any agricultural land situated in the United Provinces of Agra and Oudh or any interest in such land to be sold, shall be transferred to the Collector."

The question before the learned Judges did not arise in the precise form in which it falls for consideration at my hands, but the learned counsel is right that they held that the sale was a void sale.

[9] Indeed in 1931 A. L. J. 400<sup>2</sup> Sulaiman J. has put it more emphatically and held :

"Where a mortgage deed of joint ancestral property was executed jointly by a father and his son, who were members of a joint Hindu family, while the Collector was seized of the entire estate under Sch. 3, Civil P. C. and was taking steps to sell the whole estate, the mortgage by the father was wholly void and inoperative and could not be effective to create a charge on the property."

[10] The law, to my mind, draws a distinction between the case of an alienation of property which, from its very nature, is incapable of alienation for all time and in all circumstances,

and the case where the bar has been created for certain specific purposes. There is yet another class of cases where the law throws a special cloak of protection over the person concerned, for instance, a minor. The prohibition is absolute and a contract by him is not merely voidable but void. Where the disability attaches to the person, no question of ratification can come in. 30 Cal. 539.<sup>3</sup> The only qualification which has been introduced not by statute but by judicial decisions based upon principles of equity is that the Court may, where the minor himself seeks its aid as a plaintiff and repudiates the contract, call upon him to restitute the benefit. The leading case on this point is 1937 A. L. J. 688.<sup>4</sup>

[11] The present is not a case where the property is, by its very nature, immune from transfer, for instance, an occupancy tenancy. It is, on the other hand, a case where certain special proceedings have interposed a bar—may be a temporary bar—against the transfer.

[12] It appears to me, however, that the dictum—at least in its extreme form—laid down in 1934 A. L. J. 859<sup>1</sup>; and 1931 A. L. J. 400<sup>2</sup> cannot, after the decision of their Lordships of the Judicial Committee in 1943 A. L. J. 421,<sup>5</sup> hold the field in its full force. Say their Lordships :

"If it be settled law that the incapacity imposed on a judgment-debtor by Para. 11 of Schedule 3 is an incapacity to affect his property and not a general incapacity to contract, it follows that the covenant to repay is not made void by the mere operation of the paragraph."

Their Lordships gave effect to the principle underlying S. 65, Contract Act. If the contract was void in the sense in which the learned Judges of the Court treated it, there was no scope for the principle enshrined in S. 65. It must also be borne in mind that their Lordships went further than the learned Judges of the Full Bench in 1937 A. L. J. 688<sup>4</sup> because it was not the debtor who had moved the Court, but the creditor who was the plaintiff and who claimed and was allowed restitution.

[13] The learned counsel has also relied upon 46 Cal. 183,<sup>6</sup> according to which

"The incompetency imposed on a judgment-debtor by S. 325, Civil Procedure Code, 1882, to mortgage the property attached in execution of a decree whilst it is in the possession and under the management of the Collector, is, on the proper interpretation of the section in the exact and plain sense which the words imply, absolute, and no implied limitation can be read into it."

The Privy Council case<sup>5</sup> noticed above is an answer to this case too.

[14] The case may be approached from yet another point of view. The sale was no doubt made by the Receiver at a time when there was a cloud. It was a bad sale, not in the sense that it was void, but in view of the decision of their Lordships, in the sense that it could be



avoided. It was open to Radha Kishan to avoid it and claim back the property, it was also open to him to accept it. He elected to follow the latter course by withdrawing the sale consideration of Rs. 1,675/-.

[15] Barring S. 60, Insolvency Act, it is not suggested that there is any other provision of law to render the contract invalid because the law seems to be well settled that such an alienation in a Hindu family is not void but voidable: (19 Cal. 123,<sup>7</sup> at p. 126, and 21 A. L. J. 608).<sup>8</sup>

[16] Nor is it suggested that the sale was not justified by legal necessity or was tainted by illegality or immorality. The ratification was, therefore, a good ratification not only *qua* Radha Kishan but also *qua* the present defendants. They never repudiated it by any of the methods known to the law, they stood by for nearly ten years and then took the law into their own hands and disturbed the plaintiff's possession.

[17] In this view of the matter the plea based on S. 60, Provincial Insolvency Act, loses all its force. No other point has been argued. I, therefore, dismiss the appeal with costs. Leave to file a Letters Patent appeal is refused.

D.S. *Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 295 [C.N. 116.]**

MALIK J.

*Lal Krishna Bans Singh — Defendant — Appellant v. Taiyaba Begum and others — Plaintiffs — Respondents.*

Second Appeal No. 1357 of 1945, Decided on 11-10-1946, from decision of Civil Judge, Allahabad, D/- 19-2-1945.

(a) Civil P. C. (1908), S. 34—Suit to enforce mortgage—Court has no discretion to disallow pendente lite interest.

*Obiter* :— In a suit on mortgage for enforcement of security the interest is recoverable as a matter of right and the Court has no discretion, apart from the Debt Acts, to disallow pendente lite interest. [Para 4]

C. P. C. — ('44-Com.) O. 34 R. 11 N. 2 pt. 24.

(b) Court-fees Act (1870), Sch. I, Art. 1 — Suit to enforce charge — Preliminary decree granting pendente lite and future interest — Appeal—Court-fee payable is on amount due up to date of decree including pendente lite interest.

Where in a suit to enforce a charge the Court passes a preliminary decree with pendente lite and future interest and the defendant appeals against the decree, the amount due including pendente lite interest up to the date of the decree would be the proper valuation for the purposes of court-fee on appeal: 21 I. C. 723 (F. B.) and 35 All. 94, *Rel. on*; 21 A.I.R. 1934 All. 805, *Disting.*

[Paras 6 and 7]

Court-fees Act—('44-Com.)Sch. I Art. I, N. 15 pt. 6.

*Cases referred* :—

1. ('34) 21 A. I. R. 1934 All. 805; 57 All. 71; 150 I. C. 653, *Mithoo Lal v. Mt. Chameli*.

2. ('13) 35 All. 94; 18 I. C. 365, *Baldeo Singh v. Kalka Prasad*.

3. ('13) 11 A. L. J. 1016 : 21 I. C. 723, *Raghubir Prasad v. Shankar Baksh Singh*.

*S. C. Khare* — for Appellant.

*Aqiq Hasan* — for Respondents.

**Judgment.**—This case has been argued with ability and at some length by Mr. S. C. Khare. His contention is that his client was not liable to pay court-fees on pendente lite interest.

[2] The suit was brought for realisation of money by enforcement of a charge. The plaintiffs claimed a sum of Rs. 310 on the basis of an agreement dated 23-11-1875. The suit was decreed for Rs. 310 with interest at 3 per cent. per annum pendente lite and future and with costs. The preliminary decree provided that the plaintiffs would be entitled to get a final decree prepared after six months from 17-4-1944 the date of the decree.

[3] The defendant filed an appeal. He valued his appeal at Rs. 310. On 19-2-1945 the appeal was dismissed. The second appeal was filed by the defendant on 23-7-1945. The second appeal is also valued at Rs. 310. The preliminary decree for sale that was drawn up by the trial Court was for Rs. 310, principal and Rs. 46-13-6 interest. The Stamp Reporter has made a report that the valuation of the appeal in the lower Court and in this Court should have been Rs. 356-13-6.

[4] Learned counsel for the appellant has contested this report. He has relied on the case in A. I. R. 1934 ALL. 805.<sup>1</sup> That was a suit for profits and a simple money decree for profits and for pendente lite interest was passed. The office made a report demanding court-fees on the pendente lite interest decreed and a Bench of this Court held that court-fees on pendente lite interest was not payable. The ground for the decision was that pendente lite interest was in the discretion of the Court and the Court was not bound to allow it. The Bench held that on the grounds on which court-fees were not payable on costs decreed but not appealed against, court-fees were not payable on pendente lite interest on a claim for simple money decree where no special ground had been taken challenging the awarding of pendente lite interest. That case has nothing to do with the case before me. In a suit on a mortgage for enforcement of a security the interest is recoverable as a matter of right and the Court has no discretion, apart from the Debt Acts, to disallow pendente lite interest.

[5] The matter was considered by a Bench of this Court in 35 ALL. 94.<sup>2</sup> In that case the amount claimed up to the date of the suit on the basis of a mortgage was Rs. 1191-11-6. Interest from the date of the suit up to the date fixed for payment, which was six months from the date of the decree, was Rs. 129-12-0. Rupees 166 was the costs awarded to the plaintiffs. The



total amount payable to the plaintiffs was thus Rs. 1487-7-6. The decree provided that the amount of Rs. 1487-7-6 would be payable by the defendants whether they paid the amount on 9-1-1912 which was the date fixed for payment or earlier. The result, therefore, was that even if the defendants judgment-debtors had wanted to pay up the amount on the date of the decree they would have had to pay Rs. 1487-7-6. The Bench held that the defendants were bound to value their appeal and pay ad valorem court-fees on the amount due on the date of the decree minus costs and in view of the wording of the decree even though Rs. 1321-7-6 included a portion of interest which would accrue due after the date of the decree they held that the proper valuation was Rs. 1,321-7-6 exclusive of costs and court-fees should be paid on that amount.

[6] The matter was considered by a Full Bench of this Court in 11 A. L. J. 1016.<sup>3</sup> That was also a suit brought for recovery of amount due under a mortgage by enforcement of the mortgage. The Full Bench held that court-fees were recoverable on the amount due under the decree up to the date of the decree and on the date of the decree they held that the amount that was due to the plaintiff was Rs. 632-12-11 and the defendant was, therefore, bound to value his cross-objection at that figure and pay court-fees on that amount. Learned counsel has urged that though their Lordships talk of the date of the decree all through their judgment, yet, it would appear from an examination of the facts of the case, that pendente lite interest had not been allowed and the sum of Rs. 632-12-11 included interest only up to the date of the suit and future interest had been allowed after the date of the decree. Even if learned counsel's contention is accepted, it only means that the pendente lite interest in that suit was nil. The decision appears to me to lay down clearly that the amount due up to the date of the decree was the proper valuation in a mortgage suit for an appeal against the decree. The Full Bench decision is also an authority for the proposition that future interest after the date of the decree, unless it has been made immediately payable on the date of the decree, in case the judgment-debtor wishes to satisfy the decree on that date, need not be added to the valuation of the appeal.

[7] The appellant must, therefore, value his appeal in this Court and his appeal in the lower Court at Rs. 310 plus interest due up to the date of the decree which would include no doubt pendente lite interest. The Stamp Reporter would check up the figures and in case any lesser sum than the sum already reported is due he would inform Mr. Khare who appears for the defendant-appellant. Two months time is allow-

ed to learned counsel to make good the deficiency.

K S.

*Order accordingly.*

# **A. I. R. (34) 1947 Allahabad 296 [O. N. 117.]**

SINHA J.

*Ganga Prasad — Appellant v. Auseri Lal and another — Respondents.*

Second Appeal No. 1840 of 1945, Decided on 29-11-1946, from decision of Temporary Civil and Sessions Judge, Cawnpore, D/- 22-2-1945.

Limitation Act (1908), Arts. 142 and 144—Simple money decree against one of two co-owners of house — Decree-holder purchasing in execution judgment-debtor's share — Formal delivery given but co-owner continuing in possession of whole house—Suit by decree-holder for possession of his share filed after 12 years from date of symbolical delivery held barred.

A in execution of his simple money decree against one of the two co-owners of a house, purchased on 21-8-1928 the judgment-debtor's share in the house and obtained formal delivery of possession on 19-12-1928. On 11-1-1943 A filed a suit for possession against the co-owner in possession and subsequently impleaded the judgment-debtor's son as defendant. It was found that the whole house remained in possession of the co-owner since the date of formal delivery of possession to A.

Held that the suit was clearly barred by limitation whether Art. 142 or Art. 144 was held to be applicable to it. It was open to A to apply for actual possession within 12 years of the date of the symbolical delivery which he never did and after the expiry of twelve years not only did he lose his remedy but his right was also extinguished: 15 A. I. R. 1928 All. 412, *Foll.*; 21 A. I. R. 1934 All. 993 (F. B.) and 24 A. I. R. 1937 All. 124, *Ref.* [Paras 6, 8, 9]

Limitation Act —

('42-Com.) Arts. 142 and 144, N. 65, Pt. 11.

Cases referred :—

1. ('28) 1928-26 A. L. J. 573 : 15 A. I. R. 1928 All. 412 : 50 All. 813 : 115 I. C. 791, *Sita Ram Dube v. Ram Sunder Prasad.*
2. ('34) 1934 A. L. J. 973 : 21 A. I. R. 1934 All. 993 : 57 All. 278 : 152 I. C. 1 (F. B.), *Bindbyachal Chand v. Ram Gharib Chand.*
3. ('37) 167 I. C. 371 : 24 A. I. R. 1937 All. 124, *Ram Manohar v. Babu Singh.*

*Man Singh* — for Appellant.

*Gopal Behari* — For Respondents.

**Judgment.**—This is a defendant's appeal and arises out of a suit for possession. The property in dispute is a house in the city of Cawnpore.

[2] There were three brothers Rajaram, Lala and Gajadhar. All the three brothers had come to a partition. With the house in dispute only Lala Ram and Gajadhar were concerned. The plaintiff obtained a simple money decree against Rajaram and in execution thereof purchased the judgment-debtor's share on 21-8-1928. Rajaram died during the execution proceedings and the name of his minor son Ganga Prasad was brought on the record by an order of the Court, dated 7-7-1928. Exception was taken to the sale



of the house on behalf of the minor son, but the objection was dismissed. Formal possession was delivered to the decree-holder on 19-12-1928. In 1934 he instituted a suit for arrears of rent against Mt. Bhagwan. The suit was dismissed with a finding that she was not in occupation of it. On 11-1-1943, the present suit was instituted by the decree-holder against Lala, the brother of Rajaram. By a subsequent order dated 8-7-1943, Ganga Prasad was also cited as a defendant. The main plea, in defence, was that the claim was barred by limitation.

[3] The learned Munsif decreed the suit; and this decree was, with a slight modification, affirmed, on appeal, by the learned Temporary Civil and Sessions Judge of Cawnpore. He confined his decree to the half share of Rajaram. Ganga Prasad has come to this Court in second appeal.

[4] The learned counsel contends that, on the facts found, the claim was barred by limitation. The learned Civil and Sessions Judge has found that the evidence led by the plaintiff, that he or someone on his behalf was in possession of the house within twelve years of the suit, was unworthy of credit. There is no clear finding as to whether Ganga Prasad, the appellant, was or was not in possession of the house; but, he has found that Ganga Prasad was not in joint possession with his uncle Lala Ram; he has, in effect, found that the latter was in possession of the whole of the house.

[5] It is not denied that Art. 142, Limitation Act, will apply to this case, inasmuch as there is a clear allegation of dispossession in para. 2 of the plaint. I, however, feel that the plaintiff's claim is, in any view of the case, barred by limitation even if Art. 144 and not Art. 142, Limitation Act, is held applicable. The case is fully covered by 1928 A. L. J. 573.<sup>1</sup> The facts were briefly these :

"The predecessor-in-title of the plaintiff obtained a simple money decree against the grand-father of defendant 1. In execution of this decree he brought to sale and purchased an undivided one-third share of a house which was owned jointly by his judgment-debtor and certain others who were represented by defendants 2 to 8.

The purchase was made in 1900, and on 16-3-1903, formal possession was delivered.

The judgment-debtor continued in actual physical possession along with his former co owners, who were his relations.

In 1916, the purchaser brought a suit for partition against the other co-owners and obtained a decree for the separation of his one-third share. In 1917 he applied to be placed in actual possession. This application was opposed. On 13-4-1921, a suit for actual physical possession was brought by the plaintiff."

Lindsay J. who delivered the judgment of the Court, observes at p. 576 :

In the case of purchase of an undivided share in joint property the only possession which can be deli-

vered is joint possession and that can be done only as provided by O. 21, R. 96, Civil P. C. That was what was done in the case now before us and it follows that limitation began to run against the plaintiff from 16-3-1903 when he obtained formal delivery.

From that date he became entitled to seek actual possession of the one-third share he had purchased by demanding a partition. There was no need for him to wait for the co-operation of the other joint owners for this purpose : he could have got a separation of his share by impleading them as defendants in a suit for partition. Any co-owner of joint property can call for partition at any time as long as co-ownership exists."

[6] The above, to my mind, furnishes a complete answer to the present suit. It was open to the decree-holder to obtain the fruits of his decree, that is apply for actual possession, within twelve years of the date of the decree. That he never did. After the expiry of twelve years, not only did he lose his remedy, but his right was also extinguished.

[7] The learned counsel for the respondent seeks to support the judgment under appeal on the strength of 1934 A. L. J. 973.<sup>2</sup> That case, to my mind, has no bearing, inasmuch as no question of a decree ever arose, but, assuming that it did, it is hardly of any assistance to the plaintiff. The learned Judges gave effect to the defence that the suit was barred by limitation.

[8] Reliance was also placed on 167 I. C. 371,<sup>3</sup> a decision of this Court. That case, again, has nothing in common with this case, because again there was no question of any decree. It was a plain and simple suit as between cosharers, in which one cosharer claimed exclusive possession and pleaded that the plaintiff had, in consequence of the lapse of time, lost his title.

[9] In my opinion, the present case is, having regard to what fell from Lindsay J. in 1928 A. L. J. 573,<sup>1</sup> clearly barred by limitation.

[10] I allow the appeal, set aside the decree of the lower appellate Court, and dismiss the plaintiff's suit. Under the circumstances of the case, I direct the parties to bear their own costs throughout. Leave for a Letters Patent appeal is refused.

K.S.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 297 [C.N. 118.]**  
SINHA J.

*Chhajju and others — Defendants — Appellants v. Jai Dayal and others—Plaintiffs — Respondents.*

Second Appeal No. 1592 of 1944, Decided on 18-11-1946, from decision of Sm. C. C. Judge, Meerut, D/- 23-2-1944.

(a) Pre-emption — Pre-emptor transferring pre-empted property after pre-emption decree—Transferee making necessary deposit on requisite date and seeking to execute decree — Being resisted by vendee, transferee suing latter for possession — Vendee cannot contend that on date of sale pre-emptor had not acquired any interest in pre-



empted property and sale, therefore, did not convey any interest to plaintiff.

The crucial dates on which the plaintiff in a pre-emption suit must establish his subsisting title are the date of the sale, the date of the suit and the date of the decree, but this has reference to the property on the strength of which the suit for pre-emption is brought. It has no reference to the property in respect of which the claim for pre-emption is made: 11 A. I. R. 1924 All. 82, *Ref.* [Para 7]

Where a pre-emptor after the passing of the pre-emption decree transfers the pre-empted property and the transferee makes the necessary deposit on the requisite date, the merits of the transfer must be decided with reference to the parties themselves, that is, between the pre-emptor and the transferee and the vendee has no place in the picture. Moreover, as between them, once the pre-emptor after the deposit of pre-emption money, perfects his right to the property, he will never be heard to say that on the date of the transaction he had no right to convey. After his title becomes complete, he would, because the transfer is the transfer of the property itself as distinguished from a mere right to it, be confronted with the principle of feeding the estoppel enshrined in S. 43, T. P. Act: 22 A. I. R. 1935 All. 269 and 22 A. I. R. 1935 All. 244, *Ref.* [Para 7]

Where, therefore, the transferee in such a case, being resisted by the vendee while seeking to execute the decree for pre-emption, brings a suit for possession against the vendee, the vendee cannot contend that on the date of the sale in favour of the plaintiff, the pre-emptor had not acquired any interest in the pre-empted property and the sale, therefore, did not convey any real interest to the plaintiff. [Paras 6 and 7]

(b) Civil P. C. (1908), S. 47 — Portion of property pre-empted and not pre-emption decree transferred — Transferee resisted by vendee in execution of decree — Transferee suing vendee for possession — Suit is not barred.

Where it is not the decree for pre-emption but a portion of the property pre-empted that is transferred by the pre-emptor and the transferee, being resisted in the execution of the decree by the vendee, sues him for possession, S. 47 does not constitute a bar to the plaintiff's claim. [Para 8]

Civil P. C.—('44-Com.) S. 47, N. 24, Pt. 3.

Cases referred:—

1. ('23) 21 A. L. J. 648 : 11 A. I. R. 1924 All. 82 : 45 All. 709 : 77 I. C. 694, Baldeo Misir v. Ram-lagan Shukul.
2. ('35) 1935 A. L. J. 214 : 22 A. I. R. 1935 All. 269 : 153 I. C. 984, Abdul Ahad v. Brij Narain.
3. ('35) 1935 A. L. J. 13 : 22 A. I. R. 1935 All. 244 : 57 All. 474 : 153 I. C. 163, Shyam Narain v. Mangal Prasad.

B. Mukerji — for Appellants.

C. B. Agarwala — for Respondents.

**Judgment.** — This is an appeal by the defendants and arises out of a suit for possession. The facts, though simple, are unusual. They are briefly these: Three sale deeds were executed by Chandra Parkash and others. The first was on 1-2-1938, and remaining two on 17-6-1938. One Kamla brought a suit for pre-emption, which was decreed by the Court of first instance. On appeal by the vendees the consideration was slightly raised and the pre-emptor was given time upto 2-10-1939, to make the necessary

deposit. He transferred almost the whole of the pre-empted property to the present plaintiffs, who made the necessary deposit on the requisite date. They sought to execute their decree, but were resisted by the vendees. Hence the present suit.

[2] The plaintiffs' case was that they had purchased the property for which they paid good consideration and, as they had stepped into the shoes of their vendor Kamla they were entitled to claim possession as against the vendees. It might be noted that they cited as defendants the sons of Kamla as defendants 8 and 9. Kamla, it appears, had died meanwhile.

[3] The defence, in the main, was that the sale in favour of the plaintiffs was not a good sale and that the claim was barred by S. 47, Civil P. C. The plea of estoppel was also raised. Some other minor pleas were further taken with which it is not necessary to deal.

[4] The learned First Additional Munsif found that the sale was a good sale in the sense that the plaintiffs paid full and fair price for the property and that the transaction was not only not an improvident transaction but was actually beneficial to the vendors in that they discharged their debts, retained a portion of the pre-empted property and saved a sum of Rs. 800 as a result of this transaction.

[5] The plea based on S. 47, Civil P. C. did not find favour with the learned First Additional Munsif. He was of opinion that the case did not fall within the mischief of that section, inasmuch as the plaintiffs were not the transferees of the decree itself. What they had acquired as a result of the transfer was only a portion of the property pre-empted. On appeal, the learned Civil Judge affirmed the judgment of the learned First Additional Munsif. The defendant-vendees have come to this Court in second appeal.

[6] The learned counsel contends that, on the date of the sale in favour of the plaintiffs, the pre-emptor had not acquired any interest in the pre-empted property and the sale, therefore, did not convey any real interest to the plaintiffs. It is also contended that to the extent of the property conveyed, the plaintiffs were the representatives of the decree-holder, i. e. Kamla, the pre-emptor, and the claim was, as such, barred by S. 47, Civil P. C.

[7] To take up the first argument, it was a matter essentially between Kamla, the transferor, and the plaintiffs the transferees, whether the security transferred to the latter was a good security. It is conceded that, if Kamla had raised the amount on the basis of a promissory note, this plea would not have been available to the defendants. But it is contended that it is open to them to challenge the plaintiffs' right and to



raise the plea that the sale in their favour was a sale which conveyed no title. It appears to me that there is a fallacy in the argument of the learned counsel. This Court has held that the crucial dates on which the plaintiff in a pre-emption suit must establish his subsisting title are the date of the sale, the date of the suit and the date of the decree *vide*: 1923 A. L. J. 648,<sup>1</sup> but this has reference to the property on the strength of which the suit for pre-emption is brought. It has no reference to the property in respect of which the claim for pre-emption is made. The merits of a transaction such as the present must be decided with reference to the parties themselves, that is as here between Kamla, on the one side, and the plaintiffs on the other. In that picture the vendees have no place. It might also be mentioned that, as between them, once Kamla, after the deposit of the pre-emption money, perfected his right to the property he would never have been heard to say that on the date of the transaction he had no right to convey. After his title became complete, he would, because the transfer was the transfer of the property itself as distinguished from a mere right to it, have been confronted with the principle of feeding the estoppel enshrined in S. 43, T. P. Act. The ratio of the decision in 1935 A. L. J. 214<sup>2</sup> and in 1935 A. L. J. 13<sup>3</sup> lends countenance to this view. It seems, therefore, that the appellants' contention as regards the plaintiffs' title must fail.

[8] On the question whether S. 47, Civil P. C., constitutes a bar to the plaintiffs' claim, I am at one with the Courts below. It was not the decree but a portion of the property which was transferred. It will not be out of place to mention although it will not create any estoppel or otherwise affect the legal position that the plea does not come with a good grace from the appellants, who resisted the plaintiffs' attempt at execution on a ground just the reverse of what they are taking now. I, therefore, think that the view taken by the Courts below is right and I dismiss this appeal with costs.

V.R.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 299 [C. N. 119.]**  
SINHA AND MOOTHAM JJ.

*Badam Khan and others — Applicants v. Mahraj Suraj Narain and others — Opposite Party.*

Civil Revn. Nos. 494 of 1944 and 19 of 1945, Decided on 19-11-1946, against decree of Dist. Judge, Farukhabad, D/-5-7-1944.

Civil P. C. (1908), S. 115 and O. 41, Rr. 1 and 31 — New point in appeal — Point not involving question of jurisdiction or principle allowed to be raised — Revision.

Where a point is not taken either in the lower Court or in the memorandum of appeal to the appellate Court and the point does not involve a question of jurisdiction or of principle but is essentially, if not entirely, a question of fact, the appellate Court acts illegally and with material irregularity in allowing the point to be raised for the first time in the appellate Court and appellate order may be interfered with in revision: 14 A. I. R. 1927 All. 231 and 18 A. I. R. 1931 All. 35 (FB), *Rel. on.*

[Paras 7, 11]

Civil P. C. — ('44-Com) S. 115, Note 12 and O. 41, R. 31 N 5.

*Cases referred:—*

1. ('26) 24 A. L. J. 920 : 14 A. I. R. 1927 All. 231 : 49 All. 55 : 97 I. C. 292, Balkaran Singh v. Mt. Dulari Bai.
2. ('30) 1930 A. L. J. 1601 : 18 A. I. R. 1931 All. 35 : 53 All. 65 : 133 I. C. 428 (F. B.), Ram Kinkar Rai v. Tufani Abir.

*K. C. Saxena*—for Applicants.

*M. L. Chaturvedi*—for Opposite Party.

**Sinha J.**— This is an application in revision under S. 115, Civil P. C. and arises out of an application under S. 12, Agriculturists' Relief Act. The facts, very briefly, are these: There was one Himmat Khan who died many years ago leaving a widow, Mt. Munni, and two sons, Minda Khan and Kammu Khan. On 13-7-1843 Mt. Munni and Kammu Khan made a usufructuary mortgage of a half share in favour of one Laljimal for a sum of Rs. 175. On 12-6-1844, Minda Khan, through his mother, granted a usufructuary mortgage of the other half to the same mortgagee for the same amount of Rs. 175. It appears that Mt. Munni associated herself with the mortgage although she had no interest in the property, perhaps by way of precaution. Nothing however turns on it.

[2] On 13-3-1848, Mt. Munni and Minda Khan sold the equity of redemption with respect to the half covered by the later mortgage of 1844 to the mortgagee, Laljimal. On 6-2-1883 Laljimal having died, his heir Shibcharan sold his rights in respect of both the items of property to the heirs of the present opposite party with the result that the latter acquired full proprietary rights with respect to a half covered by the mortgage of 1844 and mortgagee rights with respect to the property embraced by the earlier mortgage of 1843.

[3] In 1905 an application for mutation of names was made by a number of people including the applicants, *viz.* Badam Khan, Mt. Abadi Begam, Afsar Khan and Majid Khan. Their attempt at substitution was resisted and once failed, but they ultimately succeeded and their names were substituted by an order of the revenue Court in place of the mortgagors.

[4] On 5-2-1943, the present application for redemption was made under S. 12, Agriculturists' Relief Act. Various defences were raised, the principal of them being that the plaintiffs were not the heirs of the mortgagors, the mortgage



was not a subsisting mortgage and the claim was barred by limitation.

[5] The learned Revenue Officer in a careful judgment, came to the conclusion that the pedigree set up by the plaintiff was proved. He also found that the mortgage was a subsisting mortgage and the claim was not barred by limitation. He decreed the suit unconditionally on the finding that the entire debt had been wiped off.

[6] It might be mentioned that on the question of the right of the plaintiffs to bring the action as heirs of the original mortgagors, the revenue officer based himself largely upon the order of the revenue Court passed in the year 1905 under which the mutation of names was effected in favour of the applicants. This order was challenged on appeal. The learned District Judge found that the pedigree set up by the plaintiffs was proved. He also agreed with the Court of first instance that the mortgage was a subsisting mortgage and that the action was not barred by limitation. He, however, found against the applicants on the ground that their ancestors as also the ancestors of the mortgagors were Hindus and no relationship could subsist as between them and they could not, therefore, be the mortgagor's heirs. The plaintiffs have come to this Court in revision.

[7] The learned counsel contends that the precise point on which the Court below has decided the case against them, was never raised even in the memorandum of appeal and it was, therefore, not open to the learned Judge to allow it to be raised, more particularly when the question involved was a mixed question of law and fact. Reliance has been placed on 1926 A. L. J. 920<sup>1</sup> and 1930 A. L. J. 1601.<sup>2</sup> The case in 1926 A. L. J. 920<sup>1</sup> is authority for the proposition that:

"The lower appellate Courts and the High Court sitting either in Letters Patent or in second appeal ought not to entertain points which should have been alleged in the pleadings and made the subject of an issue and argument and of decision by the trial Court and also stated in the grounds of appeal clearly and directly."

This case was noticed in the later case. The Full Bench case in 1930 A. L. J. 1601<sup>2</sup> does not go the whole length with the case in 1926 A. L. J. 920<sup>1</sup> but has summed up the true position in these words at p. 1606:

"From all the very numerous cases to which we have referred, and many others, we deduce the following principles, which we approve:

A point not taken in the Court below whether the omission was by the appellant in that Court or whether the respondent failed to support his decree by taking the point, will not be permitted to be raised, except possibly, 1. Where the point may be described as involving a question of public policy e.g., (1) involving jurisdiction; (2) involving the principle of *res judicata*; (3) where the decision of the point would prevent future litigation."

It is true that the learned Judges in 1930 A. L. J. 1601<sup>2</sup> made a departure from the extreme view taken in 1926 A. L. J. 920<sup>1</sup> but it is impossible to say that the present case answered the test laid down by them. The question involved was not one of jurisdiction nor was it one of principle. It was, on the other hand, essentially, if not entirely, a question of fact. It is not difficult to conceive of a case where the parties are Hindus and are not strictly governed by the Hindu law; they are governed by some custom. It is also possible to conceive of a case where the parties have ceased to be Hindus; they have either embraced Islam or Christianity but still retain the Hindu law or are governed by some special custom. It is obvious that the learned Judge should not have allowed such a point to be raised before him for the first time in appeal.

[8] In cases of this class where the transaction in dispute is an ancient transaction more than a hundred years old and lapse of time must obliterate at least some, if not the greater part of the evidence and where the success of the plaintiff depends not only upon the proof of a pedigree but upon the establishment of a particular relationship, the best course is to light upon some land-mark, if one such is available. Fortunately such a one is available in this case. It is the order of the mutation Court passed in the year 1905 when the matter was fresher and more details were available.

[9] The learned counsel for the opposite party contends that that order cannot have the force of *res judicata*. It is true, but it is an order passed by a competent Court and must have been passed after due and proper enquiry.

[10] There is another circumstance which lends added weight to that order. Ordinarily, mutation is based upon possession, but the present is not a case of that character. It was a usufructuary mortgage and it was the mortgagee who must have been in possession of the property. What had remained with the mortgagors or their heirs was the equity of redemption. The order must have been based on the result of an enquiry into the question of title. A finding in favour of the plaintiffs on the question of title must, in the peculiar circumstances, needs involve a finding as regards the legal relationship.

[11] On a consideration of all the facts, we have come to the conclusion that the learned Judge acted illegally and with material irregularity in allowing a new point to be raised before him. We, therefore, allow this application, set aside the order of the lower appellate Court and restore that of the Court of first instance with costs in all Courts.

N.S.D.

*Application allowed.*



**A. I. R. (34) 1947 Allahabad 301 [C.N.120.]****MALIK J.*****Emperor v. Ulfat Singh—Opposite Party.***

Criminal Misc. Case No. 793 of 1946, Decided on 27-11-1946, from order of Honorary Magistrate, First Class, Mainpuri, D/- 13-7-1946.

(a) Criminal P. C. (1898), S. 341—Deaf and dumb accused.

In dealing with a deaf and dumb accused charged with serious offences it is essential for a Magistrate to record a finding whether the accused can be made to understand the proceedings before passing the commitment order. [Para 2]

Cr. P. C. — ('46-Com.) S. 341, N. 5.

(b) Penal Code (1860), S. 84 — Deaf and dumb accused — An accused cannot be exempted from punishment merely because he is deaf and dumb—Criminal P. C. (1898), S. 341 [Para 2]

Cr. P. C. — ('46-Com.) S. 341, N. 5.

(c) Criminal P. C. (1898), S. 341 — Discretion of High Court — Deaf and dumb accused.

Where a deaf or dumb person is committed to stand his trial in the Court of Session or is convicted, a reference has to be made under S. 341 as a measure of extra precaution so that the High Court may satisfy itself that, under the circumstances, it was a fair trial or enquiry and in the case of an order of commitment the High Court may further give directions as to how the trial may proceed in the Court of Session. [Para 4]

Deaf and dumb person with 25 others, charged with serious offences committed to Sessions—Proceedings submitted to the High Court under S. 341—High Court, to ensure a fair trial, ordered the appointment of a special counsel for the defence at Government cost. [Para 5]

Cr. P. C. — ('46-Com.) S. 341, N. 4.

*Government Advocate* — for the Crown.

**Order.**—This is a reference by an Honorary Special Magistrate, 1st class, Mainpuri, under S. 341, Criminal P. C. Ulfat Singh and 25 others were charged under Ss. 302, 201, 325 and 323 read with S. 149, Penal Code for having committed the murder of Suraj Pal. They were also charged for having caused the evidence of his murder to disappear and having caused grievous hurt to Gokulpuri and simple hurt to Khyali and others in furtherance of the common object of an unlawful assembly constituted with the object of preventing Lajja Ram and others from recovering their bullocks which had been forcibly taken away by the accused. The accused were committed to stand their trial before the Court of Session by the Special Magistrate by an order dated 28-6-1946. Ulfat Singh accused is deaf and dumb and the learned Magistrate has, therefore, made a reference to this Court under S. 341, Criminal P. C. That section is as follows:

"If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial, and in the case of a Court other than a High Court, if such inquiry results in a commitment or if such a trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the

High Court shall pass thereon such order as it thinks fit."

[2] It would appear from the section that the Court has first to find whether the accused can be made to understand the proceedings. If the Court finds that he cannot it may proceed with inquiry or trial, but the proceedings have to be forwarded to the High Court with a report of the circumstances of the case for suitable orders by the High Court. It appears that the learned Magistrate called for a report from the Civil Surgeon whether Ulfat Singh was able to understand the proceedings. This, I find, he did after he passed his order of commitment, dated 28-6-1946. As I read the section, he should have done it before he passed his commitment order. The Civil Surgeon after examining the accused made a report that "he is incapable of understanding the spoken language but he can understand the written language if he knows them." From the report made by the learned Special Magistrate, it does not appear whether Ulfat Singh is literate. The Civil Surgeon was of opinion that the accused was not insane and was capable of understanding the proceedings of the Court; that his brain is clear, he obeys orders and reacts to all the signs correctly and quickly. The charges against the accused are of a very serious nature and there is no provision in the Indian Penal Code under which he could be exempted from punishment merely because he is deaf and dumb.

[3] Under the circumstances the Courts have to do their best to see that the trial is a fair trial and the accused gets a chance of putting up such defences as he may have. I was anxious to find out whether there was any precedent which would guide me in deciding what I should do in a case of this kind. The precedents that have been put up by the office are of cases where the deaf and dumb persons committed very minor offences and the Courts in several of those cases directed the proceedings to be dropped. I cannot pass a similar order in this case.

[4] Where a deaf or dumb person is committed to stand his trial in the Court of Session or is convicted, a reference has to be made under S. 341, Criminal P. C. as a measure of extra precaution so that the High Court may satisfy itself that, under the circumstances, it was a fair trial or enquiry and in the case of an order of commitment the High Court may further give directions as to how the trial may proceed in the Court of Session.

[5] In this case there are in all 26 accused and the brother of the deaf and dumb accused is also one of the accused. The case against all the accused is common and the evidence is the same. I do not therefore propose to interfere with the order of commitment. To ensure a fair



trial, however, I consider that a special counsel should be appointed for the accused at Government cost who may explain to the accused the nature of the charge by signs and other means and put up on his behalf such defences as he may consider proper or as the accused may desire.

[6] The Civil Surgeon in his report at one place has said that the accused is "incapacitated of understanding as ordinarily there are no means to carry to his mind the proceedings of the Court." At another place the Civil Surgeon has said that the accused is dumb but not completely deaf. It may, therefore, be possible for special counsel to get instructions from the accused. That is, however, the best that I can suggest.

[7] I, therefore, order that special counsel should be appointed at the cost of the Government for the defence of Ulfat Singh, who is deaf and dumb.

V.B.B.

*Order accordingly.*

**A. I. R. (34) 1947 Allahabad 302 [C. N. 121.]**

MULLA AND YORKE JJ.

*Ram Chand and another v. Emperor.*

Criminal Ref. No. 1038 of 1945, Decided on 23rd September 1946, from order of Sessions Judge, Agra, D/- 20th July 1945.

Criminal P. C. (1898), S. 147 (2)—Power to issue mandatory injunction.

The language of S. 147 (2) clearly indicates that if at the date when the Magistrate passes his order it is still possible to exercise the alleged right, though it may have been either threatened or partially obstructed, the Magistrate can make an order prohibiting any interference with the exercise of such right, but where it is found that the alleged right cannot possibly be exercised in consequence of some permanent obstruction created by the opposite party it would obviously be futile for a Magistrate to prohibit any interference with the exercise of such right.

Hence, S. 147 (2) does not empower a Magistrate to issue a mandatory injunction or to pass an order directing the demolition of a building or construction which has already been made : 29 A. I. R. 1942 Cal. 244 (FB) and 25 A.I.R. 1938 Nag. 297, *Rel. on*; 17 A.I.R. 1930 Mad. 865; 28 A. I. R. 1941 Mad. 752; 28 A.I.R. 1941 Lah. 210 and 27 A. I. R. 1940 Cal. 545, *Not foll.*

[Para 5]

(46-Com.) Cr. P. C., S. 147 Note 14 Pts. 8 and 9.

*Cases referred :—*

1. ('42) I. L. R. (1942) 2 Cal. 75 : 29 A. I. R. 1942 Cal. 244 : 199 I. C. 297 (F.B.), *Hemchandra Banerji v. Abdur Rahaman.*
2. ('30) 17 A. I. R. 1930 Mad. 865 : 129 I. C. 68, *Venkanna v. Venkata Surya Neeladri Rao.*
3. ('41) 28 A. I. R. 1941 Mad. 752 : 195 I. C. 606, *Thoongavadan v. Perumal Goundan.*
4. ('41) 28 A. I. R. 1941 Lah. 210 : 195 I. C. 10, *Ghumanda Singh v. Emperor.*
5. ('40) 27 A. I. R. 1940 Cal. 545 : I. L. R. (1940) 1 Cal. 468 : 191 I. C. 171, *Badridas Agarwala v. Sohanlal Oswal.*
6. ('38) 25 A. I. R. 1938 Nag. 297 : I. L. R. (1938) Nag. 580 : 175 I. C. 234, *Usmanali Mohmoodali v. Emperor.*

*B. S. Darbari* — for Applicants.

*S. N. Verma* — for Opposite Party.

*Deputy Government Advocate* — for the Crown.

**Mulla J.**—This is a reference by the learned Sessions Judge at Agra recommending that an order passed by a Magistrate on 3rd March 1945, in a proceeding under S. 147, Criminal P. C., be set aside as one beyond his jurisdiction. The facts leading up to the order in question may briefly be stated as follows :

[2] One Seth Chadammi Lal has recently purchased a house in the town of Firozabad. This house is separated by a narrow strip of land from another building to the west of it known as the Mathur Vaish Dharamshala. From a plan of the locality which is on the record it would appear, that the strip of land is about twenty-five or twenty-six feet in length and about nine feet in width. It appears to be a blind alley. The two persons, Ram Chand and Kunji Lal, on whose behalf this reference has been made, are members of the managing body of the Dharamshala. It appears from the record that in the year 1938 Seth Chadammi Lal obtained the sanction of the Municipal Board for opening a door and two windows in the western wall of his house towards the blind alley referred to above and also to let the rain water flow from his house through drains on to the narrow strip of land. On 26th January 1942, one Khushi Ram in his capacity as the general agent of Seth Chadammi Lal made an application to the Sub-Divisional Magistrate at Firozabad purporting to be under ss. 147 and 133, Criminal P. C. It was alleged in this application that the strip of land separating the house of Seth Chadammi Lal from the Dharamshala belonged to the Nazul Department and Seth Chadammi Lal had a right of passage on that land and also the right of letting the rain water flow from his house through drains on to that piece of land. It was further alleged that Ram Chand and Kunji Lal, against whom the application was directed, had started laying the foundation for a wall on that piece of land which would have the effect of totally obstructing the exercise of his rights by Seth Chadammi Lal. Lastly, it was alleged that there was an apprehension of a breach of the peace. Upon this application the Sub-Divisional Magistrate passed the following order :

"Presented before me at Firozabad on a holiday. As the matter is alleged to be urgent and apprehension of trouble is also shown, which during Muharram celebrations must be looked into at once, the application is sent to the Station Officer, Firozabad, for necessary and prompt action and report. If the allegations turn out to be well founded and the land appears to be Nazul or Municipal land, the disputed construction should be prohibited at once, pending further orders by this Court." This order appears to have been served upon



Ram Chand and Kunji Lal who accordingly stopped the construction in question. On 29th January 1942, however, Khushi Ram made another application to the Sub-Divisional Magistrate to the effect that Ram Chand and Kunji Lal had again started the construction in question in defiance of the Magistrate's order and upon that application the Magistrate made the following order :

"On the basis of the affidavit filed with this application I consider the matter requiring prompt action. No report of the S. O. Firozabad has yet been received on the complaint filed under S. 145, Criminal P. C., on 26th January 1942. I ordered on that application that the disputed construction should be prohibited if there is likelihood of the breach of the peace. I believe that order of mine was communicated to the opposite party. The present condition alleged in the affidavit shows the high-handedness which cannot be allowed. The S. O. Firozabad to attach the disputed land and construction and to report promptly."

We have examined the record but we have not been able to find anything to show that this order of attachment was in fact carried out. It appears that Ram Chand and Kunji Lal continued to make the construction until it was complete. The construction consisted of a wall raised by them just opposite to the western wall of Seth Chadammi Lal's house preventing any access to the strip of land referred to above from Chadammi Lal's house. There was some delay in a report being made by the Station Officer of Firozabad as required by the Sub-Divisional Magistrate. An examination of the Urdu order-sheet would show that the primary cause of the delay was the fact that the Station Officer of Firozabad was not supplied with a copy of the application made by Khushi Ram. It appears, however, that on 27.4.1942, the Station Officer made a report which is Ex. D-1 on the record. In this report the Station Officer said that the strip of land belonged to the Nazul Department and Ram Chand and Kunji Lal had no right to construct the wall in question but it mentioned at the same time the fact that the wall had already been completed before any order of attachment could be served upon Ram Chand and Kunji Lal and there was no question of any danger of a breach of the peace. It appears that sometime after this report the Sub-Divisional Magistrate, who was in charge of the proceeding at that time, made an inspection of the locality and on 22.5.1942, he passed the following order :

"The opposite party are called upon to show cause why the wall they have built shutting out the doors and windows of the house of Lala Chadammi Lal should not be demolished. I have inspected the locality."

This order was presumably passed on the ground that the proceeding instituted upon the application of Khushi Ram was one under S. 133, Criminal P. C. This aspect of the case has, however, not been pressed and we shall have

nothing more to say about it. The proceeding has been treated all along as one under S. 147, Criminal P. C. For various reasons the proceeding remained pending for about three years and it was only on 3-3-1945, that the Sub-Divisional Magistrate passed a final order in the following terms :

"I do order that the said Ram Chand and Kunji Lal or any one in their interest shall not take or retain possession of the said land by the erection of the wall to the exclusive enjoyment of the right of use aforesaid until he or they shall obtain a decree or order of a competent Court adjudging them to be entitled to exclusive possession and I order that the obstruction caused by the wall shall be removed by the opposite party within one month of this order failing which the removal shall be done under an order of the Court."

[3] It is against this order and particularly the last portion of it that the reference made by the learned Sessions Judge is directed.

[4] The learned Sessions Judge has pointed out that the order passed by the Magistrate, particularly the last portion of it, was in the nature of a mandatory injunction and relying upon a decision of the Calcutta High Court in the Full Bench case in *I. L. R. (1942) 2 Cal. 75<sup>1</sup>* he has held that such an order was beyond the jurisdiction of the Magistrate under S. 147, sub-s. (2), Criminal P. C. He has accordingly recommended that the whole order passed by the Magistrate should be set aside, inasmuch as the first portion of the order would be futile in the circumstances of the case and the latter portion was beyond the jurisdiction of the Magistrate.

[5] The main question which arises for consideration in this case is whether S. 147, sub-s. (2), Criminal P. C., empowers a Magistrate to issue a mandatory injunction or to pass an order directing the demolition of a building or construction which has already been made. As already stated, a Full Bench of the Calcutta High Court has definitely held that no such order can be passed by a Magistrate under S. 147, sub-s. (2), Criminal P. C., which runs as follows :

"If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right."

A contrary view has, however, been taken by the Madras High Court in *A. I. R. 1930 Mad. 865<sup>2</sup>* and *A. I. R. 1941 Mad. 752<sup>3</sup>*. The judgment in the latter case is very brief and does not give any reasons for the view taken therein; nor does it contain any reference to any previous case of the Madras High Court itself. There could be no reference to the Full Bench case of the Calcutta High Court because that came later. In the former case the dispute was as to the right of a person to the flow of water down a channel which had been blocked by the opposite party. The order passed by the Magistrate in that case prohibited the respondents from putting up any *bunds*



across the channel in their field and also from interfering with the petitioner's removing the obstructions already put up. It is significant to note that the learned Single Judge, who decided the case and who held that under S. 147, sub-s. (2), Criminal P. C., a Magistrate has not merely the power of prohibiting an act, but also the power of directing one of the parties to do a positive act by way of a mandatory injunction, did not approve of the latter part of the Magistrate's order which in effect allowed a party to remove certain constructions which had already been made and which interfered with his right. Though he did not actually hold that such an order was beyond the jurisdiction of the Magistrate, yet he refused to confirm it. There is also a Single Judge decision of the Lahore High Court in A. I. R. 1941 Lah. 210<sup>4</sup> in which it was held following the Madras view and the decision of the Calcutta High Court in A. I. R. 1940 Cal. 545<sup>5</sup> that S. 147 (2) empowers a Magistrate in a proper case to order a person to do something or in other words to direct a mandatory injunction. In that case the Magistrate had passed the following order :

"I, therefore, order that the walls and buildings erected on it should be removed and the public way reinstated as before. If the buildings are not removed within 15 days from today they should be caused to be removed at the Government expense through the P. W. D. agency with the aid of the Police, Malut."

It is again significant that in spite of the view taken by the learned single Judge he refused to confirm the latter portion of the Magistrate's order and made the following observations :

"Sitting as a Magistrate to deal with a dispute alleged to be likely to cause a breach of the peace he made an order as if he were a Civil Judge who had exhaustively considered all the issues between the parties."

The view taken in the Full Bench case of the Calcutta High Court has also been accepted by the Nagpur High Court in A. I. R. 1938 Nag. 297.<sup>6</sup> Upon a careful consideration of the scope of S. 147, sub-s. (2), Criminal P. C., we are inclined with due respect to agree with the view taken by the learned Judges of the Calcutta High Court in the Full Bench case. The language of sub-s. (2), in our judgment, clearly indicates that if at the date when the Magistrate passes his order it is still possible to exercise the right alleged by the applicant, though it may have been either threatened or partially obstructed, the Magistrate can make an order prohibiting any interference with the exercise of such right, but where it is found that the alleged right cannot possibly be exercised in consequence of some permanent obstruction created by the opposite party it would obviously be futile for a Magistrate to prohibit "any interference with the exercise of such right."

The principal, and indeed the sole object, of a proceeding under Chap. XII, Criminal P. C., which includes S. 147, is to prevent a breach of

the peace. When the exercise of the alleged right has been totally prevented, no question of a breach of the peace in consequence of the exercise of that right can possibly arise and in those circumstances we think it is not within the jurisdiction of a Magistrate under S. 147, sub-s. (2) to pass an order to the effect that the permanent obstruction should be removed. In those circumstances the matter really resolves itself into a civil dispute between the parties and they should be left to pursue their remedy in the civil Court. Once it is found that there can be no danger of a breach of the peace, there is in our judgment no justification for an order under S. 147, sub-s. (2), Criminal P. C. In the case before us it is clear that though there might have been some apprehension of a breach of the peace at the date on which Khushi Ram made his first application purporting to be under ss. 147 and 133, Criminal P. C., yet there could be no such danger at the date on which the Magistrate passed the order more than three years later, that is, on 3-3-1945. It was alleged that Ram Chand and Kunji Lal were constructing a wall which would obstruct the right of the applicant and an order was passed by the Magistrate to the effect that the land on which the wall was being constructed should be attached, but that order does not appear to have been carried out and the fact remains that Ram Chand and Kunji Lal continued to make the construction in dispute until it was completed and that there was no breach of the peace during that period. Once the construction was completed and the exercise of the right alleged by the applicant became quite impossible, there could be no question of a breach of the peace. We, therefore, accept the reference made by the learned Sessions Judge and set aside the order passed by the Magistrate on 3-3-1945.

D.H.

*Reference accepted.*

**A. I. R. (34) 1947 Allahabad 304 [C. N. 122.]**  
MOOTHAM AND MATHUR JJ.

*Shukrullah and another — Plaintiffs — Appellants v. Mt. Rahmat Bibi and others — Defendants — Respondents.*

First Appeal No. 100 of 1942, Decided on 7-11-1946, from order of Civil Judge, Gorakhpur, D/- 22-1-1942.

(a) Arbitration Act (1940), S. 23—Appellate Court has no power to make a reference to arbitration—Arbitration Act, Ss. 2 (c) and 21—Civil P. C. (1908), S. 107 (2).

An appellate Court has no power under the Arbitration Act, 1940, to make a reference to arbitration. Though under S. 107 (2), Civil P. C., an appellate Court was empowered to make an order of reference, that section has ceased to have any application to matters falling within the ambit of the Arbitration Act as the duties or powers which are thereby conferred or imposed on an appellate Court are limited to such as are conferred or imposed by that Code on Courts of original jurisdiction. [Para 8]



The word 'suit' in S. 2 has the more technical and restricted meaning of a proceeding instituted in a Court of first instance by a plaint or in such other manner as may be prescribed. In other words 'Court' for the purposes of Arbitration Act means a civil Court having jurisdiction to decide, as a suit, the questions forming the subject-matter of the suit. This is not a power which is possessed by an appellate Court as such and, therefore, an appellate Court is not competent to make a reference to arbitration under S. 23. [Para 10]

Under S. 21, Arbitration Act, only parties to the suit are competent to apply for a reference to arbitration and as parties to an appeal are not so authorised, the appellate Court would not be able to act under S. 23. [Para 26]

(b) Arbitration Act (1940), S. 31 (4)—Suit stayed under S. 34 — Appeal to High Court—High Court referring subject-matter of suit to arbitration on application by parties to appeal—Subject-matter of appeal before High Court being only propriety of stay order—Reference is invalid — Award passed thereon must be filed in High Court and not in Court in which suit was pending.

In a pending suit the defendant filed an application under S. 34, Arbitration Act for stay of the proceedings. The Court thereupon ordered the stay of proceedings for a period of one month. Similar stay orders were also passed in two other suits pending between the same parties. In appeal to the High Court against the stay order, the parties filed a compromise petition by which they agreed that the amount due to the plaintiff should be determined by a certain arbitrator and the other two suits were to be withdrawn. The High Court thereupon passed a decree in terms of the compromise and thereby appointed the arbitrator to determine the amount. The arbitrator then passed an award which was sought to be filed in the High Court but the High Court ordered it to be filed in the Court of Civil Judge in which the suit was pending. The award was then filed in the Court of Civil Judge and a decree was passed in terms of the award after dismissal of the objections to the award.

*Held* (i) that the High Court as an appellate Court had no power under the Arbitration Act to make a reference to arbitration. [Paras 10 and 26]

(ii) Even assuming that the High Court had such power it was not competent to refer the matters in dispute in the suit itself to arbitration as it was not seized of the entire case. The only question for consideration in appeal before the High Court was only the propriety of the stay order under S. 34. Moreover, when the appeal came on for hearing the period of stay of one month had expired and therefore there was no question for determination in appeal which would inevitably have had to be dismissed. Consequently so much of the decree of the High Court which related to the appointment of an arbitrator to determine the amount in suit was without jurisdiction: 7 All. 523, *Ref.*

[Para 14 and 27]

(iii) that in view of the explicit terms of S. 31 (4) no Court other than the High Court which had made the reference had the power to hear the objections to the award and to pass a decree in terms thereof. The High Court could not delegate that power to the Civil Judge and consequently the proceedings before the Civil Judge were *ultra vires* and the decree passed in terms of the award was invalid. [Paras 16 and 29]

(c) Arbitration — Award — Party to award can challenge validity of reference in appropriate proceedings—Arbitration Act (1940), S. 30.

Where there is no valid reference to arbitration the award passed would itself be nullity. Consequently, a

party to the award can challenge the validity of the reference in any appropriate proceedings apart from the provisions of S. 30, Arbitration Act, which have no application to such a case: 33 A. I. R. 1946 P. C. 72, *Rel. on.*; 24 A.I.R. 1937 All. 65 (FB), *Ref.* [Para 25]

(d) Civil P. C. (1908), S. 11—Question must be in issue and must have been heard and decided—Competency of Court to make reference to arbitration assumed—Question of competency does not operate as *res judicata*.

In order to claim the force of *res judicata* it must be shown that the point was in issue and was heard and decided: Consequently, where the parties to the appeal present an application to the High Court before which the appeal is pending on the assumption that the High Court is competent to make a reference to arbitration there is no dispute about the competency of the Court and therefore the remark of the High Court that it has such jurisdiction would not have the force of *res judicata*: 6 All. 269 (P.C.) and 8 A. I. R. 1921 P. C. 11, *Ref.* [Para 25]

*Cases referred:—*

1. ('75) 7 N. W. P. H. C. R. 243 (F. B.)
2. ('17) 4 A. I. R. 1917 All. 144: 40 I. C. 621, *Hans Raj v. Bijai Ram Singh*.
3. ('24) 11 A. I. R. 1924 Mad. 406: 73 I. C. 903, *Abdul Wahab v. Rokia Bibi*.
4. ('84) 6 All. 269: 11 I. A. 37 (P. C.), *Ram Kirpal v. Rup Kuari*.
5. ('87) 9 All. 191: 13 I. A. 134: 4 Sar 741 (P. C.), *Ledgard v. Bull*.
6. ('46) 1946 A. L. J. 254: 33 A. I. R. 1946 P. C. 72: 73 I. A. 52: I. L. R. (1946) All. 193: I. L. R. (1946) Kar P. C. 68: 223 I. C. 567 (P. C.), *Chhabba Lal v. Kallu Lal*.
7. ('36) 1936 A. L. J. 1333: 24 A. I. R. 1937 All 65: I. L. R. (1937) All. 317: 167 I. C. 99 (F. B.), *Mt. Mariam v. Mt. Amina*.
8. ('21) 19 A. L. J. 366: 8 A. I. R. 1921 P. C. 11: 48 Cal. 499: 48 I. A. 187: 60 I. C. 631 (P. C.), *G. H. Hook v. Administrator General of Bengal*.
9. ('85) 7 All. 523, *Nand Ram v. Fakirchand*.

*Mushtaq Ahmad and Z. H. Lari* — for Appellants.  
*Shambhu Prasad* — for Respondents.

**Mootham J.**—This is an appeal under S. 39, Arbitration Act, 1940, from an order dated 22-1-1942, of the Civil Judge of Gorakhpur refusing to set aside an award made on a reference under that Act.

[2] The appellants together with the respondents and three other persons were the co-owners of a sugar factory at Bhatni. On 12-12-1938, the appellants and the three persons last mentioned executed a deed, whereunder they leased, subject to the terms and conditions therein set-out, their respective shares in the sugar factory to the respondents for a term commencing on that date and ending on 31-10-1939. Differences subsequently arose between the appellants and the respondents, and on 18-3-1940, the appellants filed a suit, No. 8 of 1940 in the Court of the Civil Judge of Gorakhpur (herein referred to as suit No. 8), against the respondents for various reliefs, including the payment of a large sum of money, to which they claimed they were entitled under the terms of the lease.



[3] In their written statement filed on 18-4-1940 the respondents admitted liability in respect of part of the sum claimed, but they alleged that the parties had, by an agreement executed some years previously, agreed to submit all disputes between the co-owners of the sugar factory to arbitration. On 18-5-1940, the respondents applied to the Civil Judge under S. 34, Arbitration Act, for a stay of the proceedings in suit No. 8. Although this application was made some time after the respondents had filed their written statement the application was allowed to this extent, that by an order dated 20-7-1940, the Court directed that the proceedings be stayed for a period of one month.

[4] There were at this time two other suits, Nos. 28 and 35 of 1940 of the Court of the Civil Judge of Gorakhpur, pending between the appellants and the respondents, and in each of these suits the Court, on the application of the respondents, made a similar order staying further proceedings. Against these three stay orders appeals were filed in this Court, the appeals being numbered respectively : F. A. F. O. 168, F. A. F. O. 150, and F. A. F. O. No. 151 of 1940.

[5] On 8-11-1940, these three appeals came on for hearing, and the Court was then informed that the parties had settled all their differences and that the terms of settlement had been incorporated in a compromise agreement which they desired to file in Court. This agreement provided, *inter alia*, that suit Nos. 28 and 35 were to be withdrawn and that the amount due to the appellants in suit No. 8 should be determined by an arbitrator, Mr. Chaturvedi. This Court thereupon directed that the compromise be filed and that a decree be drawn up in its terms. This Court also, at the request of the parties, gave certain further directions, which were duly incorporated in the decree, for the purpose of implementing the compromise. One of these directions was the appointment of Mr. Chaturvedi as arbitrator to determine, within a period of one month from the date of the decree, the amount due to the appellants in suit No. 8.

[6] Mr. Chaturvedi thereupon proceeded to conduct the arbitration and in due course his award was filed in this Court. By this award the arbitrator held that not only was there no sum due from the defendants to the plaintiffs in suit No. 8 but that the defendants were due to be paid by the plaintiffs the sum of nearly one lakh of rupees, and he recommended that the suit be dismissed. Both parties filed objections in this Court to the award. The Court, however, was of opinion that the award ought to have been filed in the Court of the Civil Judge of Gorakhpur, and by an order dated 21-3-1941, it directed that both the award and the objections be referred to

that Civil Judge for disposal. This was done; the Civil Judge heard arguments and on 22-1-1942, he dismissed both sets of objections and directed that a decree in the terms of the award be prepared. It is against this order and decree that the present appeal has been filed, the contentions of the appellants falling under three main heads. It is said, first that this Court had no jurisdiction to refer the matter in dispute in suit No. 8 to arbitration, secondly, that if it had jurisdiction to make the reference, it was this Court and this Court alone which could dispose of the objections to the award and make a decree in the terms thereof, and, lastly, that the arbitrator had misconducted the proceedings within the meaning of cl. (a) of S. 30 of the Arbitration Act.

[7] The first of these arguments has two branches, for it is argued that an appellate Court has no power under the Arbitration Act to make a reference at all to arbitration, or that if it has such power, the reference it so makes must be limited to such matter as is before it in the appeal in which the order of reference is made; and accordingly that this Court had no power, in an appeal in which the sole question for determination was the propriety of a stay order, to refer to arbitration the subject-matter of the suit in the Court of first instance.

[8] The question whether an appellate Court has power under the Arbitration Act, 1940, to make a reference to arbitration is one of some interest, and we have not been referred to any case in which the question has been considered. In the case of arbitration in suits an order of reference is made under S. 23 of the Act, by the Court to which an application for that purpose is made by the parties under S. 21. That section which is in terms almost identical with those of sub-para. (1) of Para. 1 of the repealed Sch. 2 to the Civil Procedure Code, reads as follows:

"21. Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference."

There is no doubt that under the provisions of the Civil Procedure Code an appellate Court was empowered to make an order of reference, but it was so empowered, not by anything contained in Sch. 2, but by the provisions of sub-s. (2) of S. 107 of the Code which conferred upon an appellate Court the same powers, and imposed on it as nearly as may be the same duties, as were conferred or imposed by that Code on Courts of original jurisdiction. Now there is not to be found in the Arbitration Act any section corresponding to sub-s. (2) of S. 107, Civil P. C., and although under S. 41 of the former Act the provisions of the Code are



generally made applicable to all proceedings before the Court, and to all appeals under that Act, this does not in my opinion carry the matter further, for sub-s. (2) of S. 107 has ceased to have application to matters falling within the ambit of the Arbitration Act as the duties or powers which are thereby conferred or imposed on an appellate Court are limited to such as are conferred or imposed by that Code on Courts of original jurisdiction.

[9] Had ss. 21 and 23, Arbitration Act, stood alone I should have been inclined to hold that the term "suit" included an appeal, see 7 N. W. P. H. C. R. 243<sup>1</sup> at p. 246, and accordingly that "Court" embraced an appellate Court, but I think we are precluded from taking that view by the fact that the term "Court" is itself defined in S. 2, Arbitration Act as meaning

"a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not except for the purpose of arbitration proceedings under S. 21, include a Small Cause Court."

[10] Now, in this definition I think that the word "suit" can only have the more technical and restricted meaning of a proceeding instituted in a Court of first instance by a plaintiff or in such other manner as may be prescribed. In other words "Court" for the purposes of the Arbitration Act means a Civil Court having jurisdiction to decide, as a suit, the questions forming the subject-matter of the suit. This is not a power which is possessed by an appellate Court as such; and in particular it is not a power which is possessed by this High Court which under its Letters Patent has no original civil jurisdiction in respect of a dispute of the nature which formed the subject-matter of the reference to arbitration in this case. In my opinion, therefore, the appellants' contention is right, and so much of the decree of this Court dated 8-11-1940, as constituted a reference to arbitration of the matters in dispute in Suit No. 8 was not in accordance with law.

[11] The question which then arises is whether that part of the decree of this Court of 8-11-1940, which, in my view, it had no power to make, is binding upon us in the present appeal, and it has been strenuously contended on behalf of the respondents that that decree is final and cannot now be called in question. Reliance was placed upon the decisions in A. I. R. 1917 ALL. 144<sup>2</sup> and A. I. R. 1924 Mad. 406<sup>3</sup> but these decisions, for reasons which I mention below, do not, in my opinion, support the respondents' case. For the other side it is contended that the decree, so far as it purported to refer any question to arbitration, was made without jurisdiction and is, therefore, a nullity and not binding upon us.

[12] The true position can, I think, be put

shortly. On the one hand a decree or order made by a Court in respect of a matter which it has jurisdiction to entertain, whether in the exercise of its original jurisdiction or on appeal, is either final or will become final if an appeal lies therefrom and no appeal is lodged: 6 ALL. 269.<sup>4</sup> On the other hand, if the Court has no inherent jurisdiction over a particular matter the parties cannot, even by consent, convert the proceedings before the Court into a proper judicial process: 9 ALL. 191.<sup>5</sup> Reference was also made in the course of argument to the recent decision of the Privy Council in 1946 A. L. J. 254.<sup>6</sup> That case is not, I think, of very much assistance, for although the validity of a reference to arbitration was in question, all that their Lordships held on this matter was that an invalid award, being a nullity, can be challenged in any appropriate proceedings and that, therefore, an appeal (in the circumstances) lay to the High Court.

[13] The two general propositions to which I have referred do not, I think, admit of doubt, but it is said by Mr. Shambhu Prasad that in this case this Court had on 8-11-1940, jurisdiction to decide the appeal then before it, and that the whole of the decree which followed upon the judgment in that appeal has, therefore, become final. As regards the two cases upon which he relies, it was held in A. I. R. 1917 ALL. 144<sup>2</sup> that a decision in a suit given in an interlocutory matter, if not appealed from was binding upon the parties in every subsequent proceeding in that suit, and in A. I. R. 1924 Mad. 406<sup>3</sup> that the principle of *res judicata* was applicable to all orders passed in the same suit between the same parties when the question arises in subsequent proceedings in the suit. In both these cases, however, it is clear that the order, the validity of which was questioned, was made by the Court in the exercise of a jurisdiction which it undoubtedly possessed, and the cases are, therefore, merely illustrative of the first of the two general principles to which I have already referred.

[14] Now it is clear that in F. A. F. O. No. 168 of 1940 this Court had jurisdiction to dispose of the subject-matter of that appeal, which was whether the stay order made by the Civil Judge of Gorakhpur in Suit No. 8 was a proper one. On 8-11-1940, when the appeal came on for hearing the period of stay allowed by the lower Court—which as I have said was for one month—had expired; there, had therefore, ceased to be any question for determination in the appeal which would inevitably have had to be dismissed. It appears to me that what this Court did when it directed that effect be given to those provisions of the compromise between



the parties which involved the reference of the amount in dispute in Suit No. 8 to an arbitrator, was to entertain application for a reference to arbitration of the matter in dispute in that suit. This was not a matter which arose, or, in the circumstances, could arise, in the appeal. It was an extraneous application which in my opinion this Court had no jurisdiction to entertain. In my judgment, therefore, so much of the decree of this Court dated 8-11-1940, in F. A. F. O. No. 150 of 1940 as relates to the appointment of an arbitrator to determine the amount due to the plaintiffs in Suit No. 8 was made without jurisdiction and is not binding on us now.

[15] One further submission made on behalf of the respondents must be mentioned. Mr. Shambhu Prasad argued that even if this Court had no jurisdiction to refer the matter in dispute in Suit No. 8 to arbitration, this fact will not affect the validity of the award as the latter can then be treated as an award made by an arbitrator in an arbitration without the intervention of a Court pursuant to the earlier agreement made between the parties to refer all matters in dispute to arbitration. I do not think that this contention can be sustained. The arbitrator was appointed by this Court as the result of an agreement reached between the parties after the suit had been filed and embodied in the compromise petition, and it is clear, I think from the final paragraph of that petition — and no alternative inference has been suggested — that it was the intention of the parties that the award of the arbitrator should become the decree by which suit No. 8 of 1940 should be concluded. In my opinion, therefore, the award was one made in the course of an arbitration in a suit.

[16] Taking this view of the matter, it becomes unnecessary to answer the other questions of law raised in this appeal, but I concur in the conclusions at which my brother has arrived. In particular it appears to me clear that in view of the explicit terms of sub-s. (4) of S. 31, Arbitration Act, no Court other than this Court (assuming it to have been competent to make the reference) had any jurisdiction thereafter over the arbitration proceedings, and that in consequence the decree of the Civil Judge of Gorakhpur based on the award was invalid. It is also clear, I think, that no order of this Court confer upon the Court of the Civil Judge a jurisdiction which the Arbitration Act says it shall not exercise.

[17] For these reasons I am of opinion that this appeal must be allowed. The decree of the lower Court will be set aside and the suit remanded to that Court for disposal in due course of law. The appellants are entitled to their costs.

[18] **Mathur J.** — This is a plaintiff's appeal under S. 39, Arbitration Act, directed against an order of the Civil Judge of Gorakhpur dated 22-1-1942, by which he refused to set aside an award made on a reference through the intervention of the Court. Briefly stated the facts of the case are :

[19] There is a sugar factory situated in Bhatni, district Gorakhpur, in which the plaintiffs-appellants, defendants-respondents and three other hold various shares. On 22-12-1938, the plaintiffs along with three others who are not parties to the suit executed a lease in favour of the respondents relating to their share in the factory for a period commencing from the date of the lease up to 31-10-1939. The relevant terms of the lease were that the income from the sugar factory for one season will be taken to be Rs. 75,000 and on that basis the respondents were to pay to the plaintiffs a sum of Rs. 45,221-5-8 in four instalments; that if the profits from the working of the factory in one season exceeded Rs. 75,000 the plaintiffs would be entitled to recover half the profits, that may accrue over and above Rs. 75,000 and that the accounts were to be rendered by the defendants to the plaintiffs by 31-7-1940.

[20] After expiry of the term of the lease, a suit No. 8 of 1940 was filed by the plaintiffs against the defendants respondents on 18-3-1940, on the allegations that only three instalments were paid and the last instalment which amounted to Rs. 11,305-5-5 was still due, and that profits during that particular period exceeded the amount of Rs. 75,000 by a sum of Rs. 1,50,000 out of which the plaintiffs were entitled to half the amount that is Rs. 75,000. In the written statement filed by the defendants the terms of the lease mentioned in the plaint were admitted, but it was averred that the fourth instalment was already paid up, and that the amount of profits that accrued amounted only to Rs. 1,12,211 out of which a part of the excess profits were already paid up by adjustments. The defendants however admitted that a sum of Rs. 11,511-9-9 was still due from them.

[21] Subsequently the defendants made an application that there was an existing agreement between the parties that all disputes relating to the factory should be referred to arbitration, and on that ground it was prayed that the suit be stayed. This application was actually made under Sch. 2, Para. 18, Civil P. C., but as the Arbitration Act came into force in the same year the application was treated as one under S. 34 of the said Act.

[22] On 20-7-1940, the Court accepting the allegation of the defendants stayed the suit. The plaintiffs then filed an appeal in this Court



against the order of the Civil Judge staying the suit and the appeal was numbered as F. A. F. O. No. 168 of 1940. It is necessary at this stage to point out that there were two other suits between the same parties pending in the Court of the Civil Judge of Gorakhpur, one for the dissolution of partnership, and the other for partition of the factory. They were suits Nos. 28 and 35 of 1939 and in these suits as well an application was made to stay the suits under Sch. 2 Para. 18, Civil P. C. and the suits were accordingly stayed. Two appeals were filed against these orders and they were numbered as F. A. F. O. No. 150 and F.A.F.O. No. 151 of 1940. In these later suits an application was made for appointment of a Receiver and by an order of this Court Mr. Misri Lal Chaturvedi was appointed a Receiver.

[23] On 8-11-1940, all the three appeals, namely Nos. 150, 151 and 168 of 1940 came up for hearing. The parties filed an application in appeal No. 150 of 1940 alleging that a compromise was arrived at between the parties by which they had agreed that Mr. Misri Lal Chaturvedi be appointed sole arbitrator with power to decide the matters in controversy between the parties in regard to account and repairs and condition of machinery in such manner as he thinks proper. With regard to Suit No. 8 of 1940, it was laid down in this application that Mr. Chaturvedi shall ascertain and determine the amount due to the plaintiffs in that suit. According to this compromise other suits Nos. 28 and 35 of 1939 were to be withdrawn, and suit No. 8 of 1940 was to be disposed of in terms of the compromise. On the same date an order was passed by a Bench of this Court appointing Mr. Misri Lal Chaturvedi as an arbitrator and ordering that he should determine the amount due to the plaintiffs in Suit No. 8 of 1940 within one month from that date. It was stated in this order that as an appeal arising out of Suit No. 8 of 1940 was before the Bench, the Bench had jurisdiction to sanction the appointment of Mr. Chaturvedi as an arbitrator in that suit. It may be mentioned here that no issues were settled in Suit No. 8 of 1940, and neither the application nor the order mentioned the matters which were specifically referred to the arbitration of Mr. Misri Lal Chaturvedi. On 17-1-1941, Mr. Misri Lal Chaturvedi submitted an award to this Court. This Court however sent down the award to the Civil Judge of Gorakhpur for disposal according to law. Objections were filed to this award on behalf of the plaintiffs which were heard and dismissed by the Civil Judge on 22-1-1944, who refused to set aside the award. It is against this order that the present appeal has been preferred.

[24] The main points argued by appellants'

counsel in this appeal are: (1) that this Court being an appellate Court, was not authorised to refer the matter to arbitration; (2) that even if an appellate Court could refer the matter to arbitration, in the present case the reference was incompetent as the Court was not seized of the entire case; (3) that there was no proper application in appeal No. 168 of 1940 for reference of the case to arbitrators; and that the only prayer in the said application was that the Suit No. 8 of 1940 be disposed of in terms of the compromise; (4) that if this Court had made the reference, this Court and this Court alone could hear the objections and pass a decree on the award; (5) that under the circumstances, the Civil Judge was incompetent to hear the objections and to dispose them of, and his judgment and the subsequent decree passed was illegal; and (6) that the arbitrator had misconducted himself with regard to the proceedings in the making of award.

[25] On behalf of the respondents it is urged that after a decree had been passed on an award, the validity of reference cannot be challenged and it cannot be made a ground for setting aside the award. It is also contended that this Court having held that it had jurisdiction to refer the matter to arbitration that would operate as *res judicata* and cannot be reagitated. I would first deal with these two objections of the respondents. In the Full Bench case in 1936 A. L. J. 1337,<sup>7</sup> it was held by a majority that an objection to the validity of the reference to arbitration, on the ground that the reference was illegal, came within the purview of para. 15, Sch. 2, Civil P. C., and would be a good ground for setting aside an award. Sir Iqbal Ahmad dissented from this view. This had, however, settled the point so far as this Court was concerned. But in the year 1946 a judgment was delivered by the Privy Council in 1946 A. L. J. 254,<sup>6</sup> in which their Lordships remarked that they agreed with the view of Sir Iqbal Ahmad. Their Lordships however went on to say, "in their opinion all the powers conferred upon the Court in relation to an award on a reference made in a suit presuppose a valid reference on which an award has been made which may be open to question. If there is no valid reference, the purported award is a nullity, and can be challenged in any appropriate proceeding."

It has been argued on behalf of the respondents that this Privy Council case has overruled the majority decision of the Full Bench and it is no longer open to any party to contest an award on the ground that the reference to arbitration itself was invalid. I am however unable to accept this view of the matter. The Privy Council has no doubt held that para. 15, Sch. II, Civil P. C., which now corresponds to S. 30, Arbitration Act, did not apply in such a case, but they



have gone still further and have held that if there was no valid reference the award would itself be a nullity. Thus this question can be raised in any proceeding apart from the provisions of S. 30, Arbitration Act. I hold, therefore, that the plaintiffs are certainly entitled to show that the reference itself was invalid, and if they succeed in that, that would certainly result in nullifying the award. On the second point, reliance has been placed on two Privy Council decisions, one reported in 6 ALL. 269<sup>4</sup> and the other reported in 19 A.L.J. 366<sup>8</sup> in order to show that even where an order is not by itself *res judicata* as in the case of execution proceedings, it will certainly have the force of *res judicata* if previously passed in the same case. It seems however clear to me that in order to claim the force of *res judicata* it must be shown that the point was in issue and was heard and decided. In the two cases noted above, the matter was in issue between the parties and a decision was given thereon. In the case before us, both the parties presented an application to this Court on the assumption that this Court was competent to make a reference. There was thus no dispute about this matter between the parties and the remark of this Court that it had jurisdiction in these circumstances would not have the force of *res judicata*.

[26] Coming now to the objections raised on behalf of the plaintiffs-appellants, it is a matter of some little difficulty as to whether the appellate Court has any power to refer a matter to arbitration. Section 21, Arbitration Act, only authorises parties to a suit to make an application for reference to arbitration provided certain conditions are fulfilled. It does not confer any power on the Court itself. After such an application has been made, S. 23 says that the Court shall by an order refer to the arbitrator the matter in difference which he is required to determine. At one time when this law of arbitration figured as Sch. II, Civil P. C., it was held in some cases that under S. 107, Civil P. C., the appellate Court had the same powers as the Court of original jurisdiction and therefore could refer the matter to arbitration. Now that a separate Arbitration Act has been passed, S. 107, Civil P. C., would not be applicable and those rulings would not be of any help. As such, it appears to me that the appellate Court has no power to refer a matter to arbitration. If I may point out with respect, even S. 107 would not be helpful because it refers to the powers of the appellate Court and not to right of the parties. Under S. 21 only parties to the suit are competent to apply for a reference to arbitration and as parties to an appeal are not so authorised, the appellate Court would not be able to act under

S. 23. In this view of the matter this Court was not competent to make a reference to arbitration.

[27] (2) It is clear from the record that the appeal No. 168 of 1940 which was pending in this Court was against the order of the Civil Judge staying the suit under S. 34, Arbitration Act. The Court was therefore not seized of the entire case and was in my opinion not competent to refer the matters in dispute in the case itself to arbitration. By way of analogy I may refer to the case in 7 ALL. 523,<sup>9</sup> in which it was held that a Court to which issues had been remitted by the appellate Court has only jurisdiction to try the issues remitted, and is *functus officio* in other respects, and cannot make a reference of the case to arbitration. The only point in issue in appeal was whether the suit was properly stayed and for that purpose alone the case was before this Court. I am thus of opinion that on that ground also the Court was not competent to make the reference.

[28] (3) I think there is substance in this point as well. Section 21, Arbitration Act lays down that the matters in difference between the parties can only be referred to arbitration. In Sch. II, para. 1, Civil P. C., it was further laid down that the application shall be in writing and shall state the matters sought to be referred. This has now been omitted in S. 21, but it seems necessary that the points on which arbitration is sought should be clearly set out and that a vague reference would always lead to difficulties. It has been pointed out, and I think correctly, that in the application of 8-11-1940, there was no prayer that the suit be referred to the arbitration of Mr. Misri Lal Chaturvedi. Clause (5) was that the arbitrator shall ascertain and determine the amount due to the plaintiffs in suit No. 8 of 1940 of the Court of the Civil Judge of Gorakhpur with regard to their claim in that suit, and the only prayer was that the suit No. 8 of 1940 shall be disposed of in terms of this compromise. In these circumstances I think that this Court granted what was not prayed for by making a reference of the case to Mr. Misri Lal Chaturvedi.

[29] (4) and (5) To my mind, the proposition appears to be unexceptionable that the Court which makes a reference and to which an award is submitted is alone authorised to hear the objections on the award and to pass a decree in terms of the award. This Court could not delegate that power to the Civil Judge of Gorakhpur and on that account also all the proceedings before the Civil Judge would be *ultra vires* and his order refusing to set aside the award shall have to be vacated.

[30] (6) It is not necessary to express any opi-



nion on this point as the points already discussed are sufficient to dispose of the case.

[31] I feel certain that the award could not be maintained and ought to have been set aside. The order of the learned Civil Judge refusing to set aside the award should therefore be set aside. The decree which he passed in accordance with the award will consequently be vacated and the case will be sent back to the lower Court for disposal according to law. The plaintiffs-appellants shall get their costs from the respondents.

**By the Court.** — This appeal is allowed with costs. The decree of the lower Court is set aside and the suit is remanded to that Court for disposal in due course of law.

K.S. *Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 311 [C. N. 123.]**  
VERMA AND BENNETT JJ.

*Jamna Prasad v. Ahmad Wali Khan.*

Second Appeal No. 2101 of 1944, Decided on 25-2-1946, from decision of Dist. Judge, Bareilly, D/- 14-7-1944.

Civil P. C. (1908), S. 11, Expln. 4—Pre-emption decree — Money payable by pre-emptor—Subsequent suit by him for excess paid by him.

Where a decree for pre-emption in respect of property which was subject to a mortgage decree was passed subject to payment of a certain amount which was arrived at after deducting the decretal liability but not the interest due thereon and subsequently the pre-emptor had to pay the decretal amount with interest, in a suit by the pre-emptor against the vendee to recover the amount paid as interest :

*Held*, that the pre-emptor not having appealed from the pre-emption decree on the ground that the amount should have been reduced by the interest, he could not be allowed to re-open the matter in another suit.

[Para 11]

('44-Com) Civil P. C., S. 11, N. 35, Pt. 3.

*C. B. Agarwala* — for Appellants.

*Mushtaq Ahmad* — for Respondents.

**Bennett J.** — This is a defendants' appeal. The suit out of which it has arisen was brought by certain pre-emptors, respondents in the appeal, to recover a sum of Rs. 700, which they were obliged to pay to protect from sale in execution of a decree the property which they had pre-empted. The sum which they actually paid with this object was Rs. 3143, but the greater part of this was taken into account in determining the amount to be paid by them in order to pre-empt the property. One of the questions which we shall have to consider and which we do not think has received sufficient attention from the Courts below is whether such a suit was maintainable.

[2] The property consists of a third share in certain zamindari property in a village of the Bareilly District. Bhagwat Prasad, one of the defendants in the suit, was the owner of this property. In 1930 he executed two simple mortgages, hypothecating in favour of L. Ram Dhan

Das. The latter obtained a decree on these mortgages in 1934, the amount due under the decree after amendment in 1936 being Rs. 2821 for the payment of which instalments were allowed.

[3] Some time after this Bhagwat Prasad executed a usufructuary mortgage of the property in favour of the present appellants or their predecessors-in-interest. The sum of Rs. 2821, due to Ram Dhan Das, was left with them for payment to him. Of this sum only Rs. 450 was paid.

[4] On 2-11-1940, Bhagwat Prasad executed a sale deed of the property in favour of the usufructuary mortgagees for Rs. 10,500, the amount due under the decree for the payment of which they had previously assumed liability being part of the sale consideration.

[5] The pre-emption suit was brought by the respondents in 1941 and was decreed on 22-1-1942, subject to payment of Rs. 8229 within one month. This amount was paid. No appeal was preferred against the decree.

[6] Ram Dhan Das sold his decree to other persons and to save the property from sale in execution proceedings the respondents satisfied the decree by payment, as stated, of Rs. 3143.

[7] The sum of Rs. 8229 which the respondents were required to pay in order to pre-empt the property was arrived at in this way. The decretal liability of Rs. 2371 (that is, Rs. 2821 less Rs. 450, paid) was deducted from the sale price of Rs. 10,500 (leaving Rs. 8129) and the respondents were required to pay the vendees a further sum of Rs. 100 on account of the sale deed.

[8] But interest had been running on the decretal amount and consequently to satisfy the mortgage decree the respondents had to pay Rs. 3143, or Rs. 772 more than the amount (Rs. 2371) allowed for this purpose in the pre-emption decree. The respondents assumed liability for costs of execution and interest accrued from the date of the pre-emption decree and thus claimed only Rs. 700. Their case was that as the vendees had assumed liability for payment of the mortgage decree when Bhagwat Prasad first of all mortgaged and then sold the property to them they were entitled on acquiring the property to recover from the vendees the amount which they had to pay, over and above the amount allowed for this purpose in the pre-emption decree, as but for the failure of the vendees to carry out their undertaking to satisfy the decree no such burden would have fallen on them. In other words they claimed to enforce against the vendees the right which Bhagwat Prasad would have enjoyed against them as mortgagees had he retained the property and



satisfied the decree on the mortgagees' failure to do so.

[9] The Courts below after considering various arguments concluded that the suit should be decreed. The main argument advanced against this view appears to have been that there was no privity of contract between the plaintiffs (that is, the present respondents) and defendants. The Munsif rejected this argument, observing as follows :

"The result of the pre-emption decree was that the plaintiffs were substituted in place of defendants 1 to 3 (the vendees) so far as sale transaction was concerned. The equity of redemption sold by Bhagwat Prasad came to the plaintiffs and they came in the position of Bhagwat Prasad, the mortgagor, defendants 1 to 3 remained mortgagees. Whatever rights Bhagwat Prasad had are available to the plaintiffs. The mortgagor could file a suit for damages against defendants 1 to 3 for the loss caused to him, as in the usufructuary deed defendants 1 to 3 took upon themselves to pay the amount and there was implied guarantee of indemnity to protect the mortgagor from any loss arising to him by the non-fulfilment of the contract. The same right is available to the plaintiffs."

The Munsif also held that as Bhagwat Prasad had retained no interest in the property the plaintiffs had no cause of action against him. Bhagwat Prasad has accordingly not been impleaded as a respondent in this appeal.

[10] The District Judge considered some other aspects of the legal position (some of his remarks being rather difficult to follow) but came substantially to the same conclusion, though he appears to have thought that strictly speaking the plaintiffs should have recovered the amount from Bhagwat Prasad who could then have recovered it from the usufructuary mortgagees who had contracted with him. He said:

"In fact it is practically conceded by the appellants that the plaintiffs could recover this amount from Bhagwat Prasad who could recover it in turn from the defendants and this would merely lead to multiplicity of litigation and as in equity there is certainly a moral responsibility upon defendants 1 to 3 to pay up the full decretal amount, I think it would be encouraging litigation to force the parties to go about it in such a round-about manner merely on the basis of what is rather an academic argument."

[11] We do not deny the appellants' moral or indeed legal responsibility so far as Bhagwat Prasad is concerned, had the property remained in his hands, but we think the Courts below have not taken adequately into consideration the facts subsequent to the usufructuary mortgage. There may be more ways than one of looking at the matter but the facts which seem to us to have a substantial bearing on the legal position are these. When the mortgagees purchased the property in 1940 they took it subject to the liability under the decree of 1934-36. The result of the pre-emption decree was that the plaintiffs-respondents stepped into their shoes; they accepted liability in their place and it is clear that this

was understood and that effect was intended to be given to it in the pre-emption decree, as they were allowed credit for the amount received by the mortgagees for the purpose of satisfying the decree. Nor were they ignorant of the fact that this amount was then inadequate for this purpose, their plaint clearly shows that they knew that more would have to be paid to satisfy the decree. If the Munsif who passed the pre-emption decree was justified in giving partial effect to the appellants' liability and making deduction from the sale price to the extent stated — and this is not disputed—we see no reason why he should not have given full effect to it and deducted from the sale price the whole amount which, on calculation, might have been found due under the decree. This possibility, however, was apparently not brought to the notice of the Court by the pre-emptors and it does not appear to have occurred to the Court itself. But if the relief for which the pre-emptors now ask could and should have been obtained in the pre-emption suit, we cannot hold that the pre-emptors are entitled to raise the question in a later suit. It seems to us to be implicit in the judgment in the pre-emption suit that the rights of the parties in the matter were adjudicated upon fully as regards the terms upon which the plaintiffs could pre-empt, and that the effect of the appellants' liability to satisfy the decree was taken into consideration. If the plaintiffs were not satisfied with the finding that they had to pay as much as Rs. 8229 to obtain the property subject to the charge upon it under the mortgage decree, they could have appealed from the pre-emption decree on the ground that this amount should have been reduced by the interest which they would have to pay in addition to the sum of Rs. 2371 allowed for. We see no reason to distinguish between this sum and the interest which had accrued on it. The vendees took the property from Bhagwat Prasad subject to the liability as it stood at the time of sale and not as it stood at the time of the mortgage and the fact that at the time of the mortgage that liability was for a smaller sum is in our opinion immaterial. The plaintiffs asked to be substituted for the vendees and they succeeded in their suit. The possibility that if the legal position had been better appreciated they might have been required to pay less than Rs. 8229 is no ground for allowing them to re-open the matter in another suit.

[12] We are unable therefore to agree with the Courts below that the present suit was maintainable. We allow the appeal, set aside the decrees of the Courts below and dismiss the suit with costs to the appellants throughout.

V.R.

*Appeal allowed.*



**A. I. R. (34) 1947 Allahabad 313 [C. N. 124.]**

**MOOTHAM J.**

*Dhondha Misir and others—Appellants v. Sheikh Qurban—Plaintiff—Respondent.*

Second Appeal No. 1538 of 1945, Decided on 13-1-1947, from decision of Addl. Civil Judge, Gorakhpur, D/- 15-5-1945.

Civil P. C. (1908), O. 21, R. 57 — 'Default' — Decree-holder unable to proceed with his application and to have the property sold — He is in default.

The word 'default' in R. 57 means failure to do what the decree-holder was bound to do, that is, to go on with his application and have the property sold. Hence where the decree-holder who has attached the property finds himself unable to proceed with his application and have the property sold he is in default within the meaning of R. 57 of O. 21:6 A.I.R. 1919 All. 194, *Rel. on*; 9 A. I. B. 1922 All. 62, *Disting.* [Paras 4 & 5]

C. P. C.—('44-Com.) O. 21, R. 57, N. 2, Pt. 1.

*Cases referred :—*

1. ('19) 41 All. 157 : 6 A. I. R. 1919 All. 194 : 49 I. C. 113, Dildar Husain v. Sheo Narain.

2. ('22) 44 All. 274 : 9 A. I. R. 1922 All. 62 : 65 I. C. 91, Mahomed Mubarak Husain v. Sabu Bimal Prasad.

*N. D. Pant*—for Appellants.

*S. N. Misra*—for Respondent.

**Judgment.** — In my opinion this second appeal fails. In 1932 one Baramdeo, who has since died and is represented in this appeal by his sons the appellants, obtained a money decree against Nathuni Kandui. In November, 1938, the judgment-debtor executed a mortgage of certain of his properties which included a house, in favour of Sheikh Qurban, the respondent. Later in the same month the decree-holder sought to execute his decree by the attachment of this house, and by an order of the Court dated 22-12-1938, the house was attached. In January, 1939, the decree-holder for some reason which is not clear, was unable to proceed with the execution of his decree and he asked the Court for an order that his application be kept pending and the attachment on the house maintained. Upon this application the Court made the following order on 28-1-1939 :

"Execution application dismissed, attachment to continue, papers consigned to office."

[2] Nothing further appears to have happened till 19-9-1940, when the judgment-debtor sold the mortgaged property to his mortgagee, the respondent, and then in March, 1941, the decree-holder applied to the Court for the execution of his decree by the sale of the house. Despite an objection lodged by the respondent the house was sold in April 1942, and the sale was confirmed in the following month. The respondent thereupon brought the suit out of which this appeal arises for a declaration that the house was not liable to be sold in execution of the decree. His suit was decreed in the trial Court and an appeal to the Court of the Additional

Civil Judge of Gorakhpur by the unsuccessful decree-holder was dismissed. Both the Courts took the view that the order of 28-1-1939 was made under O. 21, R. 57, Civil P. C., and the application for execution having been dismissed, the attachment automatically came to an end.

[3] It has been contended in this Court on behalf of the appellants that the provisions of R. 57 can have no application as it was not by reason of any default by the decree-holder that the Court was unable to proceed further with the application for execution. The grounds of the application made by the decree-holder to the Court in January, 1939, are not as I have said, clear, and it has been suggested that the decree-holder found himself unable to execute his decree on account of the provisions of the Temporary Postponement of Execution of Decrees Act, 1937. This Act is not however mentioned in the application and if its provisions were applicable the decree-holder would be in a further difficulty as the judgment-debtor's house was attached after the Act had come in force and apparently in contravention of its terms.

[4] The meaning to be attached to the word 'default' in R. 57 was considered by this Court in 41 ALL. 157<sup>1</sup> in which Sir Henry Richard C. J. said :

"It really means a failure to do what the decree-holder was bound to do, that is, to go on with his application and have the property sold. I am supported in this view, I think, by the provision in the rule itself that in a fitting case the application for execution can be adjourned in which case of course the attachment could be maintained."

[5] A similar view was expressed in the same case by Tudball J. My attention has been drawn to a later decision 44 ALL. 274<sup>2</sup> in which it is said that this Court by implication disapproved of the view taken in 41 ALL. 157.<sup>1</sup> In 44 ALL. 274,<sup>2</sup> however, the decree-holder was admittedly in default, and the Court had only to determine the effect, as between the decree-holder and judgment-debtor, of an order that the proceedings stand adjourned *sine die*. The present question did not, therefore, arise. Now, as I have said, what actually moved the decree-holder to make this application to the Court in this case has not been explained, but it is clear that he found himself unable to proceed with his application and have the property sold. I think, therefore, that he was in default within the meaning of R. 57 of O. 21.

[6] It has further been argued that, even if the order were made under R. 57, the Court did not intend to dismiss the application, but intended only to adjourn the proceedings to a future date, and this, it is said, must be so because the Court directed that the attachment should continue. I do not think that there is any force in



this argument. Whatever have been the precise terms of the application which was made to the Court, it is clear that what the Court was asked to do was to adjourn the proceedings. It would have been a very easy matter for the Court to have made an order to this effect, but it appears to me that it specifically declined to do so, for what has been said is, in unambiguous terms, "the execution application is dismissed". In my opinion, therefore, the view taken by the lower appellate Court is correct and this appeal must be dismissed with costs. Leave to file a Letters Patent appeal is refused.

D.S.

*Appeal dismissed.***A. I. R. (34) 1947 Allahabad 314 [C. N. 125.]**

ALLSOP AND SINHA JJ.

*Mt. Shiva Kumari Devi — Defendant — Appellant v. Udeya Partap Singh and another — Plaintiffs—Respondents.*

First Appeals Nos. 367 and 368 of 1942, Decided on 6-2-1947, against decision of Civil Judge, Cawnpore, D/- 11-5-1942.

(a) Hindu law — Concubine — Avarudh Stree — Status of — Test—Infatuation to be distinguished from love.

An "Avarudh Stree" has not the same status as that of a wife, but that status is very akin to it. The law recognises a clear and well defined line between a harlot and an 'Avarudh Stree.' She may be a concubine but she may, by her fidelity to her paramour, win a position of dignity and respect in his family. Fidelity to him or to his memory is an essential condition. She is a wife though not in the orthodox sense. As a wife she has a distinctive position, she is admitted in the bosom of the family, though she may not be living in the house occupied by the family. She may not be the mistress of the house and yet she commands the affection of her paramour and the respect due and ordinarily shown to a wife: 13 A. I. R. 1926 P. O. 73, *Rel. on.*

[Para 11]

In considering whether a concubine has been kept by a Hindu practically as a member of the family, a distinction must be made between what is mere infatuation and the love which a husband bears towards his wife.

[Para 12]

(b) Transfer of Property Act (1882), S. 122 — Doctrine of advancement.

Even if a purchase has been made in the name of a concubine but with the funds of her paramour it is for the concubine to establish that it was made for her, because the doctrine of advancement does not apply in India: 12 A. I. R. 1925 P. C. 181, *Rel. on.* [Para 13]

('45-Com.) T. P. Act, S. 122, N. 11.

(c) Oudh Estates Act (1 of 1869), Preamble—"Such other matters"—Expression "such other matters" is an elastic expression — It is in its connotation always illustrative and not exhaustive. [Para 18]

(d) Oudh Estates Act (1 of 1869), Ss. 24, 25, 26, 27 and 28—Right of maintenance of Avarudh Stree under Hindu law, if affected—Hindu law—Maintenance — Avarudh Stree.

The Oudh Estates Act is an enabling Act. If certain person possesses certain rights under a different system of law or under the general law of the land, that right is not taken away by the Oudh Estates Act. Therefore,

if the Hindu law gives a concubine, a right of maintenance as an 'Avarudh Stree' that right is not taken away by the Oudh Estates Act and she would be entitled to a charge on the property covered by the Oudh Estates Act. [Para 17]

*Cases referred :—*

1. ('26) 24 A. L. J. 729 : 13 A. I. R. 1926 P. C. 73 : 53 I. A. 153 : 50 Bom. 604 : 96 I. C. 20 (P. C.), *Naghubai v. Monghibai.*

2. ('25) 23 A. L. J. 662 : 12 A. I. R. 1925 P. C. 181 : 52 I. A. 286 : 48 Mad. 605:88 I. C. 327 (P. C.), *Sura Lakshmiah v. Kothandarama Pillai.*

*Sir Syed Wazir Hasan and S. N. Seth*

— for Appellant.

*N. P. Asthana, M. Wasim, Mansur Alam and B. L. Dikshit* — for Respondents.

**Sinha J.** — This and the connected Appeal No. 368 of 1942 arise out of the same set of facts. Suit No. 74 of 1937 was instituted on 10-11-1937 by Raja Udeya Pratap Singh, Talukdar of Dharampur Katiari in the district of Hardoi, now represented by the Deputy Commissioner, Hardoi, in charge of the Court of Wards, against Mt. Munna prostitute, alias Ram Kumari alias Shiv Kumari. Suit No. 12 of 1938 was instituted on 20-1-1938, by Mt. Shiv Kumari Devi alias Munnaji against Raja Udeya Pratap Singh.

[2] The earlier suit was brought by the Raja for possession of the 'Dan Villa,' bungalow in the city of Cawnpore and also for recovery of Rs. 300 on account of mesne profits. The allegations in the plaint are briefly these: Raja Bahadur Raja Rukmangad Singh, the father of the plaintiff was the owner of the bungalow. The defendant was a prostitute in the keeping of the deceased. She was allowed to occupy the house in connection with the marriage of a brother in January 1933 and, in spite of a registered notice sent by the plaintiff who succeeded his father on his death, on 19-1-1937, she did not vacate it. Instead, she claimed its ownership. The defence, in the main, was that she was an 'Avarudh Stree' of the late Raja Bahadur and was treated by him with affection and marked consideration and was so treated by his relations including the plaintiff. In accordance with the family practice and custom the late Raja Bahadur

"(a) provided the defendant with suitable residence; (b) paid the defendant a monthly allowance of Rs. 300 per annum (sic) as her pocket money; (c) paid other expenses of food, raiment, conveyance, medical attendance, establishment etc., over and above the said pocket money; (d) placed at her disposal several cars for her personal use, the last one being a Plymouth 1935 model No. 6349 L. W., U. P. which remained in the defendant's exclusive possession till 28-1-1937, in her own right and title of maintenance; and (e) gave her plenty of money by way of gift and presented to her many other valuables, from time to time."

She was maintained as an 'Avarudh Stree' whether she lived at Katyari or Cawnpore or Lucknow and the pocket money used to be paid to her as it used to be paid to the other members of the family. The Raja Bahadur gave her



Rs. 19,000 for the purchase of the bungalow in dispute, which stood on the banks of the Ganges, because she was religiously inclined and wanted a house so situated. It was purchased by her on 4-10-1934, but in the name of the Raja, out of respect for his memory. She has been, she goes on to say, in exclusive possession of the house since its purchase on 4-10-1934.

[3] The plaint of the Suit No. 12 of 1938 was practically a rehearsal of the written statement of the earlier suit and the written statement was a repetition of the allegations in the plaint. In this suit she prayed for a declaration that she was the owner of the 'Dan Villa'; and was entitled to remain in its possession. She claimed a sum of Rs. 6000 on account of maintenance and wanted it to be created a charge on the property mentioned in Sch. 'A'.

[4] The learned Civil Judge framed the following issues in Suit No. 74 of 1937:

(1) Was the sale-deed dated 4-10-1934, in favour of Raja Bahadur Raja Rukmangad Singh a benami sale? Was Shrimati Sheo Kumari the real vendee? (2) Was Shrimati Shiva Kumari an 'Avarudh Stree' of the late Raja Bahadur Rukmangad Singh? If so, has she a right of residence for life in the house in suit? (3) Is the plaintiff entitled to mesne profits? (4) Is the plaintiff owner of the bungalow in suit or he is only a benamidar?

[5] In Suit No. 12 of 1938 he settled the following issues:

(1) Has the Court no jurisdiction to try the suit? (2) Is the suit bad for multifariousness? (3) Is the court-fee paid insufficient? (4) Is the plaintiff 'Avarudh Stree' of the late Raja Bahadur Raja Rukmangad Singh? (5) Is the plaintiff entitled to maintenance? (6) In case the plaintiff is 'Avarudh Stree' of the late Raja is she entitled to maintenance out of the estate left by the said Raja in the hands of the defendant? (7) Is the plaintiff the real owner of the bungalow No. 11/13 and the sale-deed in favour of the late Raja was only benami? (8) Has the plaintiff the right of residence in the said bungalow by reason of her being an Avarudh Stree of the late Raja Bahadur? (9) To what relief, if any, is the plaintiff entitled?

[6] The learned Civil Judge found that Mt. Shiv Kumari Devi

"was in permanent keeping of the late Raja Bahadur from 1932 up to his death which took place in 1937 and that she was his Avarudh Stree in the eye of the law."

He also found that the estate of the late Raja Bahadur belonged to three classes. Part of it was governed by the Oudh Estates Act; another part by the Oudh Settled Estates Act and the rest was non-talukdari property. He held that it was not open to the late Raja Bahadur, in view of ss. 15 and 22 of the Oudh Settled Estates Act, to create a charge on that portion beyond his life-time. As regards the portion covered by the Oudh Estates Act, he came to the conclusion that it was only certain named classes that could claim its benefits but not the plaintiff. With

regard to the rest of the property he was of opinion that the Raja of Katiari was included in List II of the Oudh Estates Act and his estate is governed by the family custom of impartibility and it descends to a single heir. The rights, therefore, fall to be determined according to custom and not by the general principles of Hindu law. As no custom was pleaded by Mt. Shiva Kumari, she was not entitled to any maintenance. He came to the conclusion that the Raja purchased the house for himself and with his own money. In the result he dismissed the suit.

[7] Mt. Shiv Kumari has come to this Court in appeal. She has preferred appeals in both the suits. She claims that she is the owner of the 'Dan Villa' and, at all events, she is entitled to remain in possession of it as 'Avarudh Stree' and claims maintenance as such. Her contention, in effect, is that she is entitled to claim a charge in lieu of her maintenance on the estate of the Raja. On behalf of Raja Udeya Pratap Singh this position is challenged. It is contended that the finding of the learned Civil Judge that she was an 'Avarudh Stree' is not warranted by the materials on the record.

[8] The points that have emerged for consideration are: (1) Whether Mt. Shiv Kumari has established her ownership of the 'Dan Villa' and her status as 'Avarudh Stree' of the late Raja Rukmangad Singh? (2) In case she has, is she entitled to claim maintenance as a charge on any portion of the estate or a right of residence in the house?

[9] The first question, therefore, which confronts us, is whether she has established her status as an 'Avarudh Stree'. The law on this point was laid down by Lord Darling in the well known case in 1926 A. L. J. 729.<sup>1</sup> At p. 732 his Lordship says as follows:

"The question now to be decided upon this evidence is whether the appellant is entitled to maintenance out of the estate of the deceased, and this, as appears from the judgments delivered in the Court of appeal, depends upon whether, upon the facts proved, she was in a strict sense, according to the Hindu law, as prevailing in Bombay, the 'permanent concubine' of deceased. This word concubine has long had a definite meaning, whether expressed in the language of India or of Europe. The persons denoted by it had, and have still where it remains applicable, a recognised status 'below that of wife and above that of harlot. In the Glossary of Ducange, under the title *Concubina*, we read that *Pellex honestior est quam amica, ut quae accidat proprius ad uxoris naturam*: and this, it would seem, is because *uxor nomen est dignitatis non voluptatis*. Almost a wife, according to ancient authorities, the distinction of concubine from harlots was due to a modified chastity, in that she was affected to one man only, although in an irregular union merely. So Bracton is quoted by Ducange as writing, *eadem etiam concubina legitima dicitur ad discrimen ejus quae quaestum*



*facit*. Harlots solicited to immorality; concubines were reserved by one man."

[10] In other words she is an '*Avarudh Stree*' provided the concubinage is permanent, until the death of the paramour and sexual fidelity be reserved to him. She is entitled to maintenance even though she be not kept in the family house of the deceased. Residence in the family house was not considered

"an essential reason for the right to have maintenance from the goods of the deceased paramour, but rather a means to ensure qualified chastity of the mistress."

There is no evidence before us that she did not observe fidelity to the deceased. The question still remains whether she has established her status as an '*Avarudh Stree*.'

[11] She has not the same status as that of a wife, but that status is very akin to it. If one thing emerges clearly from the judgment of Lord Darling, it is that the law recognises a clear and well defined line between a harlot and an '*Avarudh Stree*'. She may be a concubine but she may, by her fidelity to her paramour, win a position of dignity and respect in his family. Fidelity to him or to his memory is an essential condition. It is difficult to bring out the meaning in its full force in English, but it appears to be clear that she is a wife though not in the orthodox sense. As a wife she has a distinctive position, she is admitted in the bosom of the family, though she may not be living in the house occupied by the family. She may not be the mistress of the house and yet she commands the affection of her paramour and the respect due and ordinarily shown to a wife.

[12] Treveleyan in his Hindu Law, Edn. 3, p. 91, has thus summed up the result of the authorities culminating in the decision in *Nagubai's case*: 1926 A. L. J. 729.<sup>1</sup>

"A concubine, who has been kept by a Hindu continuously to the time of his death, *practically as a member of the family*, is entitled to maintenance from the property (whether ancestral or self acquired) of her deceased paramour, whether she have children or not, but loses right on incontinence."

The italics are ours. Did Mt. Shiv Kumari ever acquire such a position? Was she ever treated *practically as a member of the family*? The evidence on the record no doubt proves that the Raja was greatly fond of her and very much devoted to her, but, here again, a distinction must be made between what is mere infatuation and the love which a husband bears towards his wife. (Their Lordships considered the evidence and proceeded.) Taking into consideration all the circumstances, it is impossible to say that she was a woman permanently in the keeping of the late Raja Bahadur, *practically a member of the family* who had attained the status of an '*Avarudh Stree*'.

[13] The next question is whether the appellant has succeeded in establishing that the '*Dan Villa*' purchased from Mrs. Stone was really purchased for her. The law is well settled that even if the purchase had been made in her name but with the funds of the Raja, it would have been for her to establish that it was made for her, because the doctrine of advancement does not apply to this country, 1925 A. L. J. 662.<sup>2</sup>

"A purchase in India by a native of India of a property in India in the name of his wife unexplained by either proved or admitted facts is to be regarded as a benami transaction by which the beneficial interest in the property is in the husband although the ostensible title is in the wife."

Here the purchase stands in the name of the Raja himself. It lies, therefore, on the appellant to satisfy the Court, by cogent evidence, that the Raja was only an ostensible and not the real purchaser or that he made in her favour a gift of the money with which the purchase was made. (Their Lordships after considering the evidence affirmed the finding of the Civil Judge that the house belonged to the Raja who purchased it with his own money and for himself; the appellant was not its owner or beneficiary and proceeded:) On the finding that the appellant was not an '*Avarudh Stree*' of the Raja and that she was not the true owner of the house, her claim must fail and the appeal must stand dismissed, but as we have differed from the learned Civil Judge in his finding on the status of the appellant, we propose to address ourselves to the questions of law.

[14] The Katiari estate consists of property of three classes—part of it is governed by the Oudh Settled Estates Act—another part by the Oudh Estates Act and a portion is non-talukdari property. Mr. Shambhu Nath Seth, the learned counsel for the appellant, conceded that he can lay no claim to the property governed by the Oudh Settled Estates Act. It is also conceded that the five villages mentioned in Sch. A of her plaint and over which a charge is sought for the amount due to her on account of the arrears of maintenance, are all governed by the Oudh Settled Estates Act. If it is so, her claim must fail on this ground alone. But the learned counsel contends that this does not preclude us, in case we accept her case otherwise, from declaring a charge on property other than that governed by the Oudh Settled Estates Act. We, therefore, propose to consider whether she is entitled to claim a charge on other classes of property, although we should not be understood to accede to this contention.

[15] The Oudh Estates Act deals with the proprietary rights in diverse estates in the pro-



vince of Oudh conferred upon talukdars and defines the

"rights of the said talukdars and others in such estates and as to the course of succession thereto."

It also attempts

"to regulate such course and provide for such other matters connected therewith as are hereinafter mentioned."

The expression "such other matters" connected therewith is somewhat vague. It is clear that the matters mentioned are not exhaustive and are only illustrative. Sections 22 to 28 are the material sections.

[16] Section 22 provides with special rules and S. 23 with general rules of succession to intestate talukdars and grantees. Section 24 says:

"When any talukdar or grantee, or his heir or legatee, dies leaving him surviving such relatives as are hereinafter mentioned, the person for the time being in the possession of his estate or the rents and profits thereof shall be liable to pay to each of such relatives during his or her life . . . . Provided that such relative was at the date of the death of the deceased living with him: Provided also that such relative is and continues to be without any other adequate means of maintenance."

Section 25 speaks of grand-parents, and senior widows of the deceased and also provides for the junior widows. Section 26 speaks of brothers, nephews and minor sons of the deceased. Section 27 says that "in the case of unmarried daughters of the deceased, widows of his sons or brothers and his widows not of his *ahl-i-bradari* . . . ." We are not concerned with S. 28.

[17] The learned counsel for the appellant founded no argument on the provision made for "widows not of his *ahl-i-bradari*." All he contends is that the list furnished by Ss. 24, 25, 26, 27 and 28 does not exhaust the list of persons entitled to maintenance. If the Hindu law gives the appellant a right of maintenance as an '*Avarudh Stree*' that right is not taken away by the Oudh Estates Act. The learned counsel for the respondent, on the other hand, contends that no one outside the list furnished by these sections, is entitled to maintenance and this special piece of legislation must, on the well known principle of law, *generalia specialibus non derogant*, override the general Hindu law. The principle of law to which an appeal has been made by the learned counsel for the respondent, does not, in our opinion, assist him. It must be borne in mind that this Act is an enabling Act i. e., it is a statute which makes it lawful to do something which will not otherwise be lawful: Craze on Statute Law (4th Edn., p. 62). In other words certain rights not recognised by the general law find recognition as a result of this statute, or certain persons having no rights or having restricted rights are given rights either for the first time or larger or more amplified rights. But the statute does not curtail

the existing rights. This is the true purpose of an enabling Act. If the appellant possesses certain rights under a different system of law or under the general law of the land, that right is not taken away by the Oudh Estates Act.

[18] We have to construe this Act in the above light. Besides, the general scheme of the Act also supports the contention of the learned counsel for the appellant. The preamble of the Act, if reference to it is permissible, seeks "to provide for such other matters connected therewith as are hereinafter mentioned." It is true, that the matters are those which are to be 'hereinafter mentioned,' but the expression 'such other matters' is an elastic expression. It is, in its connotation, always illustrative and not exhaustive. We are, therefore, of opinion that the appellant would, if her title is otherwise made out, be entitled to a charge on the property covered by the Oudh Estates Act. What we have said about the Oudh Estates Act applies to non-talukdari property also. Her claim must, in view of what has been said above, fail even as regards it.

[19] We have, therefore, come to the conclusion that the appellant has failed to establish that she is an '*Avarudh Stree*'. She has also failed to establish that the Raja was not the real purchaser of the '*Dan Villa*' and that she was its real owner. Her claim must fail. It must also fail on the ground that the five villages mentioned in Sch. A of her plaint, in respect of which a charge was sought to be created, fell within the ambit of the Oudh Estates Act. We, therefore, dismiss both the appeals with costs.

V.B.B.

*Appeals dismissed.*

A. I. R. (34) 1947 Allahabad 317 [C. N. 126.]

VERMA J.

*on difference between*

MATHUR AND ALLSOP JJ.

*Jagdish and another—Defendants—Appellants v. Mt. Kausilla Devi, Plaintiff and others, Defendants—Respondents.*

First Appeal No. 507 of 1942, Decided on 8-5-1946, from decision of Civil Judge, Bareilly, D/- 21-10-1942.

(a) Benami — K, a Hindu widow knowing that certain property was liked very much by her deceased husband and deceased sons contributing towards its purchase in name of her guru B by supplying part of consideration — B put in charge of property—K held did not become proprietor of property under sale deed. (Per Allsop and Verma JJ.)

(Per Allsop J.) — The origin of the money is not the sole consideration in deciding whether a transaction is benami. It is an essential element in a benami transaction that the person who claims the property should show that he was intended really to be the owner. The question whether the person who has supplied the consideration is to be treated as the owner of the property really depends upon the intention at the time of the purchase. [Paras 38 and 39]



*K*, a Hindu widow, knowing that certain property was liked very much by her deceased husband and deceased sons contributed towards the purchase of it in the name of *B* who was a religious preceptor of her family by supplying Rs. 4000 out of the total consideration of Rs. 10,000. *B* was put in charge of the property:

*Held*, (Per *Allsop and Verma JJ.*) that in these circumstances *K* did not become the proprietor of the property under the sale deed executed in favour of *B*. It was the intention that the property should be dedicated for religious purposes and the position of *B* was that of a trustee. [Paras 49 and 60]

(b) Contract Act (1872), S. 23 — Compromise of criminal proceedings—*K* contributing towards purchase of property in name of *B* with intention of dedicating it for religious purposes—*B* put in possession of property — *K*'s men removing fruit from property—*B* filing application under S. 145, Criminal P. C., followed by complaint under S. 395, Penal Code—Both parties making false assertions of title—Subsequent deed of compromise by *K* and *B* — *B* declared to be manager of property and agreeing to get criminal proceedings struck off—Agreement is not void. (Per *Allsop and Verma JJ.*)

(Per *Allsop J.*) — In determining whether an agreement is void under S. 23, Contract Act, the Courts should look to the substance of the agreement between the parties. If there is suspicion of blackmail or extortion or if the contract was based upon a promise really to hamper the administration of law so as to prevent investigation into a criminal charge which was of interest not only to the persons concerned but to the public at large, then the contract should not be enforced. If, however, there is a *bona fide* civil dispute which the parties have decided to settle and there happen to be subsidiary proceedings in a criminal Court, it would be contrary to public policy and to justice and equity to allow any person to escape his proper legal liabilities on the mere technical ground that there was some understanding that those criminal proceedings would not be pressed to a conclusion. [Para 31]

One *K* a Hindu widow contributed to purchase of certain property in the name of her guru *B* with the intention of dedicating it for religious purposes. *B* was put in possession of the property, and was managing it. *K* purported to sell the fruit of the trees on the property to some one other than the man to whom *B* had sold it and the harvested crop of the portion of the land which was cultivated was removed by certain persons under her orders. *B* first filed an application under S. 145, Criminal P. C., and followed it up with a complaint under S. 395, Penal Code. Both parties were making false assertions of title and were suppressing the truth that the property did not belong to either of them. Subsequently *K* and *B* executed a deed of compromise by which both parties declared that they had created a wakf of the property in favour of a deity and that *B* would be the manager and Sarbarakar of the property and that *K* and her heirs would not interfere with his management. *B* agreed to have the cases in the criminal Courts struck off. *K* brought a suit for declaration that the deed of compromise was not binding on her:

*Held*, (Per *Allsop and Verma JJ.*) that this was really a civil dispute between *K* and *B* and the so-called criminal proceedings which were not in any real sense criminal at all were merely a subsidiary matter. Hence the deed of compromise should not be held to be void on the ground that *B* agreed not to press proceedings in the criminal Courts: *Case law referred*.

[Paras 34, 50 and 60]

(c) Hindu law—Religious endowment—Endowment to deity—It is not necessary that particular idol should be consecrated or in existence at date of execution of deed. (Per *Allsop and Verma JJ.*)

In order that an endowment to the deity may be valid, it is not necessary that the particular image or idol should be consecrated, or even in existence, at the date of the execution of the deed. It is sufficient if the property is set apart and is put in the hands of a trustee until the idol or image is procured, and consecrated, if necessary: *Case law referred*. [Paras 36 and 55]

*Cases referred* :—

1. ('18) 16 A. L. J. 905 : 5 A. I. R. 1918 P. C. 249 : 124 P. R. 1918 : 48 I. C. 1 (P. C.), Lala Balla Mal v. Abad Shab.
2. ('37) 1937 A. L. J. 333 : 24 A. I. R. 1937 All. 370 : 169 I. C. 533, Banu Mal v. Ratan Deo.
3. ('81) 7 C.L.R. 278, Doorga Prosad v. Sheo Prasad.
4. ('10) 37 Cal. 128 : 3 I. C. 642 (F. B.), Bhupati Nath v. Ram Lal.
5. ('98) 25 Cal. 405, Upendra Lal v. Hemchandra.
6. ('02) 29 Cal. 260, Rojomoyee Dassee v. Troylukhyo Mohiney Dassee.
7. ('03) 30 Cal. 521, Nogendra Nandini Dassee v. Benoy Krishna Deb.
8. ('11) 33 All. 253 : 8 I. C. 832, Chaturbhuj v. Chatterjit.
9. ('31) 53 All. 710 : 19 A. I. R. 1932 All. 244 : 137 I. C. 187, Bankay Lal v. Peare Lal.
10. (1892) 1 Ch. D. 173 : 61 L. J. Ch. 138 : 65 L. T. 685 : 40 W. R. 273, Jones v. Merionethshire Permanent Benefit Building Society.
11. ('30) 57 Cal. 1302 : 17 A. I. R. 1930 P. C. 100 : 57 I. A. 117 : 123 I. C. 187 (P. C.), Kamini Kumar Basu v. Birendra Nath.
12. ('13) 40 Cal. 232 : 21 I. C. 194, Sarat Chandra Ghose v. Pratap Chandra.
13. ('19) 46 Cal. 951 : 6 A. I. R. 1919 Cal. 199 : 51 I. C. 215, Chandi Charan v. Haribola Das.
14. (1854-57) 6 M. I. A. 53 : 1 Sar. 493 : 2 Suther. 13 (P. C.), Gopeekrist Gosain v. Gungapersaud Gosain.
15. ('69-70) 13 M. I. A. 232 : 4 Beng. L. R. 1 : 2 Sar. 522 (P. C.), Moulvie Sayyud Uzhur Ali v. Mt. Bebee Ulfat Fatima.
16. ('36) 23 A. I. R. 1936 Rang. 256 : 14 Rang. 242 : 163 I. C. 211 (F. B.), Maung Tun Pe v. B. K. Halder.
17. ('99) 26 Cal. 227 : 26 I. A. 38 : 7 Sar. 425 (P. C.), Ram Narain v. Mahomed Hadi.
18. ('31) 6 Luck. 556 : 19 A. I. R. 1932 P. C. 13 : 59 I. A. 1 : 136 I. C. 385 (P. C.), Mahomed Sadiq Ali Khan v. Fakhr Jahan Begam.
19. ('34) 21 A. I. R. 1934 Mad. 671 : 153 I. C. 478, Thulasi Ammal v. Official Receiver, Coimbatore.
20. ('15) 42 Cal. 286 : 3 A. I. R. 1916 Cal. 74 : 28 I. C. 713, Amjadunnissa Bibi v. Rahim Buksh.
21. ('16) 20 C. W. N. 760 : 3 A. I. R. 1916 Pat. 284 : 33 I. C. 711, Bindeshwari Prasad v. Lekhraj Sahu.
22. ('31) 58 Cal. 1235 : 18 A. I. R. 1931 P. C. 79 : 58 I. A. 91 : 131 I. C. 762 (P. C.), Ariff v. Jadunath Majumdar.
23. ('23) 50 Cal. 929 : 10 A. I. R. 1923 P. C. 189 : 50 I. A. 239 : 74 I. C. 499 (P. C.), Annada Mohan Roy v. Gour Mohan.
24. ('10) 32 All. 337 : 5 I. C. 584, Mohar Singh v. Hel Singh.
25. ('21) 44 Mad. 831 : 9 A. I. R. 1922 P. C. 123 : 48 I. A. 302 : 65 I. C. 161 (P. C.), Vidya Varuthi v. Balusami Ayyar.
26. ('33) 60 Cal. 452 : 19 A. I. R. 1932 Cal. 791 : 141 I. C. 544 (F. B.), Manohar Mukherji v. Bhupendra Nath.

*P. N. Sharma* — for Appellants.

*C. B. Agarwala, H. P. Gupta and J. N. Chatterjee* — for Respondents.



**Mathur J.** — This is an appeal on behalf of the defendants directed against a decree of the learned Civil Judge of Bareilly, dated 21-10-1942. The plaintiff-respondent Mt. Kausilla Devi raised an action for possession of the plots in dispute, known as Sagbari and Nudah Umar Khan, on a declaration that the deed of compromise dated 22-7-1940, was entirely unlawful and ineffectual against her. The allegations set forth in the plaint were, that by a sale deed dated 16-8-1936, the plaintiff purchased the plots in dispute for a consideration of Rs. 10,000 from the relations of her husband with her own money *ism farzi* in the name of Goswami Bal Krishna, the predecessor-in-title of the defendants-appellants, that she obtained possession over the property, but Goswami Bal Krishna managed the property, as her agent. That in the year 1940, as Goswami Bal Krishna had cut some trees from the said plots and her lessee Rudra was obstructed by Nabi Buksh who claimed to be a lessee from Goswami Bal Krishna, she served a notice on the latter, in reply to which her proprietary title was denied. That subsequently, Goswami Bal Krishna started proceedings under s. 145, Criminal P. C., against her and also filed a complaint under s. 395, Penal Code, and thus induced her to enter into a compromise dated 22-7-1940, by which she created a waqf of the property in favour of Sri Thakur Radha Krishnaji Maharaj appointing Goswami Bal Krishna as a manager and Sarbarahkar and the latter took upon himself to have the cases in the criminal Courts struck off. It was contended on these facts that the said deed of compromise was unlawful and void as (a) the plaintiff-respondent could not get an opportunity to obtain independent advice in respect of the compromise; (b) having threatened the plaintiff to implicate her in absolutely false criminal cases and bringing unlawful pressure to bear upon her, the compromise was obtained from the plaintiff; (c) the defendant was the Guru of the plaintiff, hence the plaintiff was under the influence of the defendant and could not refuse his proposal to enter into a compromise; (d) no idol was permanently installed at any place hence no valid waqf could be made nor was it made.

[2] The defence of the defendants-appellants was that Goswami Bal Krishna was not a Guru of the plaintiff, that he had purchased the property with his own money and remained in its possession; that the plaintiff had independent advice, and that it was under pressure that Goswami Bal Krishna agreed that the property be made waqf and entered into a compromise.

[3] The learned Civil Judge framed seven issues out of which the three following are now material:

“(1) Whether the grove in dispute was purchased *farzi* in the name of Goswami Bal Krishna from the money of the plaintiff?

(2) Whether Goswami Bal Krishna had purchased the grove in question from his money?

(3) Whether any valid waqf was created with regard to the grove in question? Is the compromise dated 22-7-1940, invalid for reasons stated in Para. 13B of the plaint?

[4] His findings on all the three issues were in favour of the plaintiff, and consequently he gave a decree for declaration that the deed of compromise dated 22-7-1940, was not binding on the plaintiff and that the defendants should deliver possession of the disputed property to her.

[5] The defendants have filed this appeal and they have challenged the findings of the learned lower Court on all the points. On behalf of the plaintiff-respondent a cross-objection has been filed and it relates only to the costs, as the lower Court, while decreeing her suit, did not allow her the costs of the suit.

[6] It appears that out of the consideration of the sale deed dated 26-8-1936, by which the plots in dispute were purchased in the name of Goswami Bal Krishna Rs. 2000 was paid in cash to the vendors as earnest money and Rs. 7,000 was paid in cash before the Sub-Registrar, while for the remaining sum of Rs. 1000 a promissory note was executed by Goswami Bal Krishna in favour of the vendors. Out of this amount of Rs. 7000 paid in cash before Sub-Registrar the sum of Rs. 5000 was raised by mortgaging the plots in dispute in favour of Shib Shankar and another. This mortgage was executed by Goswami Bal Krishna. From the evidence on the record it seems clear that the entire sale consideration was provided by Mt. Kausilla Devi out of her own money and some money of Mt. Ganga Devi which she had in her hands. This fact is admitted in the deed of compromise dated 22-7-1940, and is also proved from the oral evidence produced on behalf of the plaintiff. The story of the defendants-appellants that Goswami Bal Krishna provided any part of the money appears to be a myth. He was never possessed of any means or of any property from which he could have that amount. On behalf of the defendants a copy of the savings bank account of Goswami Bal Krishna was produced to show that out of it he drew two sums of Rs. 5000 each, on 3rd August and 11-8-1937 respectively. But that very account shows that he had deposited that amount only a few months before on 11-5-1937. The evidence produced on behalf of Mt. Kausilla shows that she had sent Rs. 1000 each on two occasions to Goswami Bal Krishna for payment to the mortgagees and to Ram Kumar. I have therefore no hesitation in holding that the considera-



tion of the sale deed of 26-8-1936, was provided by Mt. Kausilla Devi. In *benami* transactions generally it is the source from which the consideration is paid that decides the ownership of the property. In my opinion, that should be sufficient to hold that Mt. Kausilla Devi the plaintiff was the owner of the property.

[7] In this case certain considerations have been raised in order to show that although she provided the money Goswami Bal Krishna was the real owner. It has been urged that it was never intended that she should have a beneficial interest in it. It is first argued that no good reason is assigned why the property should have been purchased *ismfarzi* in the name of Goswami Bal Krishna. Mt. Kausilla Devi has stated that her husband was interested in the property, so she wanted to purchase the same, but her relations to whom the property belonged were not willing to let her have it. At first sight this statement does not seem to be very convincing, but when the facts are further investigated, it would appear that her conduct was quite natural. The property in dispute belonged to a joint family of which the plaintiff's husband was a member. He was taking a keen interest in the property and according to Para. 2 of the plaint, had made improvements in it. But subsequently when after the death of the plaintiff's husband there was a litigation the plaintiff was not given any share in the property, but was only allowed a certain sum as maintenance. She was, however, anxious to have this property, but her relations, partly because of the litigation that had ensued between them, and partly on account of the delicacy in settling the price were not willing to transfer the property to her. It was, therefore, not surprising that she got the property in the name of Goswami Bal Krishna who was a spiritual preceptor of at least some members of the family. If this statement be taken as true, it would make it highly improbable that she at any time intended to part with that property by creating a waqf. Great stress has been laid on the fact that after the purchase Goswami Bal Krishna was allowed to remain in possession. If it is true that the relations of the plaintiff were not willing to transfer the property to her, it was necessary at least for some time to keep up appearances and to allow Goswami Bal Krishna to remain in possession. It was necessary to raise an amount of Rs. 5000 by mortgaging the property, and it was, therefore, mortgaged by Goswami Bal Krishna in whose name it stood. For some time after that the income of the property was to go towards the satisfaction of the mortgage and as Goswami Bal Krishna was liable to pay the amount, he remained in possession and paid off the mortgage. In my view,

no inference against the plaintiff-respondent can be drawn from this fact of possession. In any case, these considerations are not sufficient for holding, that the general rule of law, that the person, who provides the money is the owner of the property in a *benami* transaction, is not applicable to this case.

[8] The next point to be considered is whether any lawful and enforceable compromise was entered into on 22-7-1940, and whether it did create a valid waqf. There is sufficient evidence to show that Mt. Kausilla Devi had an opportunity of getting independent advice as she was assisted by Babu Surya Prakash a lawyer practising in Bareilly and who was her near relation. I do not think it is necessary to discuss this point any further.

[9] The learned Civil Judge has found that as the compromise dated 22-7-1940, contained an agreement for stifling a prosecution, it was opposed to public policy, and was as such, unlawful. He further held that as no idol was in existence at the time of the creation of the waqf, it was not valid. On both these points I am in full agreement with the conclusions of the learned Civil Judge.

[10] A great deal of argument has been advanced on the point that according to Indian statute it is only the failure to give information of the commission of certain offences which is punishable by law, and that if a promise is made not to lay information of such an offence it would be unlawful. In my humble opinion this point hardly arises in this case, and it need not be considered. Here the prosecution had already originated on the basis of a complaint, and the only question would be whether it would be against public policy or not, to allow the complainant to drop those proceedings, for a consideration.

[11] It is then argued that it is not within the province of a complainant to withdraw a prosecution, and that his duty ends after he has lodged a complaint. I may again point out, with respect, that in this case no question arises whether it was legal or otherwise to compound an offence. It, however, always depends on the nature of the offence, and if it is uncompoundable according to the provisions of the Criminal Procedure Code, it would certainly be unlawful to compound it for a consideration. Section 252, Criminal P. C., certainly lays down that on ascertaining from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, the Magistrate shall summon such persons to give evidence before him as he thinks necessary. This technicality does throw the responsibility of summoning the



witnesses on the Magistrate, but in complaint cases it practically rests with the complainant to proceed with the case or to drop it. If a complainant agrees for a consideration to drop the proceedings merely by absenting himself or not assisting the Court any further that consideration would, in my opinion, be certainly unlawful as opposed to public policy. In this connection reference may be made to illust. (b) of S. 23, Contract Act, which lays down :

"A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void as its object is unlawful."

[12] Before proceeding further I may just point out that according to a Privy Council case reported in 16 A. L. J. 905,<sup>1</sup> illustrations are a part of the Statute and are entitled to the same weight. It seems clear to me that if in consideration of not giving his assistance to the prosecution of B, A gets a promise from B to get his things back, he cannot be allowed to enforce that agreement. The intention of the law appears to be that it would be against public policy to permit an agreement like that. The expression 'public policy' is a rather elastic term, and it would be difficult to define it and to classify agreements opposed to public policy. But the illustration just cited gives a clue to the intention of the Legislature. I may in this connection refer to a case reported in 1937 A. L. J. 333<sup>2</sup> which supports the view that I am taking. The two criminal cases for which a provision was made in the deed of compromise that they shall be struck off were, one under S. 145, Criminal P. C., and the other under S. 395, Penal Code. It is true that the proceedings under S. 145 cannot be called a criminal prosecution. The other case under S. 395, Penal Code, was against the servants of Mt. Kausilla Devi, and it is argued that she was not directly concerned with it. It seems from the reading of the complaint which is printed at page 57 of the paperbook that she, Mt. Kausilla Devi, was not named as an accused, but the following allegations were made against her and she was liable to be hauled up and prosecuted :

"So far as I could ascertain at the grove this was done at the instigation of Mt. Kausilla and the stolen property has also been deposited in her house and is still there. In case sufficient evidence is available, a request shall be made for action against Mt. Kausilla Devi also"

[13] This was both, an information given against her for an offence under S. 412, Penal Code, and a threat to prosecute her. Mt. Kausilla Devi belongs to a very respectable family and was about 80 years old on the date when she was examined in the lower Court. It is no wonder that she got alarmed at the prospect of being dragged into Court and being humili-

liated by being tried for such a heinous offence. I do not think that the fact that the complaint was a false one, or that the dispute was of a civil nature matters in the least. Once a prosecution is launched, whatever its merits may be, the position of an accused person is far from enviable. It would be certainly against public policy to uphold an agreement by a person in that predicament to pass a consideration for dropping a prosecution against him. In the present case it appears to me that Mt. Kausilla Devi agreed to create a waqf and to confer unlimited powers on Goswami Bal Krishna and his heirs in consideration of the cases under S. 145, Criminal P. C., and S. 395, Penal Code, being struck off. On page 68 of the paper-book the order of the Magistrate dismissing the complaint under S. 395, Penal Code, is printed. It runs :

"Complainant is absent. There is no prima facie evidence of any offence of any kind on this file. Complaint is dismissed and accused are discharged."

[14] Whatever may be the legal duties of a Magistrate, it invariably happens in complaint cases that when a complainant is absent the complaint is dismissed and the accused is discharged. No Magistrate ever takes the trouble of taking upon himself the responsibility of summoning any evidence and prosecuting the case to its logical end. The accused who can, by agreeing to pay a consideration, induce the complainant to stay his hands can reasonably be sure of escaping the consequences. In this view of the matter I think the compromise was opposed to public policy and the consideration of the agreement to create a waqf was unlawful and void.

[15] I find no difficulty in believing the evidence of the plaintiff that at the time when the compromise or the deed of waqf was executed no idol of Sri Thakur Radha Krishnaji Maharaj was in existence, and therefore no valid waqf could be made. No great reliance can be placed on the deed dated 22-7-1940, the validity of which is in dispute, for holding the existence of the idol. Even in that deed it is recited that the idol was in possession of Mt. Kausilla Devi and was to be taken to Bindraban on Kunwar Sudi 10th sambat 1997, the Dasehra day, to be installed in the house of Goswami Bal Krishna. It is palpably false that the idol was taken to Bindraban and installed there, in view of the fact that the suit was instituted before the Dasehra day fixed for taking away the idol. If it has not been installed, it cannot have a juridical existence, because in 7 C L R 278<sup>3</sup> it was held that an idol cannot be said to have a juridical existence unless it has been consecrated by proper ceremonies and thus has become spiritualised. It has, however, been



argued that the existence of an idol is not a *sine quo non* for the validity of a waqf deed. Reference has been made to a Full Bench case reported in 37 Cal. 128.<sup>4</sup> What has been laid down in that case is that a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death was valid. To my mind there is a clear distinction between a bequest or gift made in favour of the idol himself and one made in favour of the trustees. The first fails when the idol does not exist, but the second is not vitiated in accordance with the principles laid down by the Full Bench.

[16] A number of cases, namely 25 Cal. 405,<sup>5</sup> 29 Cal. 260<sup>6</sup> and 30 Cal. 521,<sup>7</sup> were cited on the other side, but it is stated that they have been overruled by the Full Bench case reported in 37 Cal. 128.<sup>4</sup> I find, however, that they have been overruled only so far as they were in conflict with the view of the Full Bench. I do not think that it can be doubted for a moment that the waqf in favour of the idol himself who is not in existence would be invalid. The difficulty can certainly be bridged over by appointing trustees and charging them with the duty of installing an idol. There are also two cases of this Court reported in 33 ALL. 253<sup>8</sup> and 53 ALL. 710.<sup>9</sup> In the first of these cases, it will be seen that a trust was created for the worship of an idol which was to be consecrated and placed in a temple and a certain person Bhola was made a trustee thereof. In the latter case, it was held that a deed of endowment under which property was dedicated to "Sri Ram Chanderji Maharaj the God of the two worlds," the deity was not associated with any particular idol or shrine, was held to be valid. I do not think any of these two cases can be held to be an authority for the proposition that the waqf of a property in favour of a non-existent idol without the intervention of a trustee would be valid. In my judgment, the plaintiff's suit was rightly decreed even on this ground. I would, therefore, dismiss this appeal with costs to the respondents, and confirm the decree of the learned Civil Judge decreeing the plaintiff's suit.

[17] As regards the cross-objection, I think it must prevail. According to S. 35, Civil P. C., the costs must follow the result of the suit unless for the reasons given the learned Judge decides otherwise. In this case no reasons are given by the learned Civil Judge. I would, therefore, allow the cross-objection and would modify the decree of the learned Civil Judge by awarding the plaintiff costs in the lower Court as well.

[18] **Allsop J.** — This is an appeal against a decree by which the learned Civil Judge of Bareilly declared that a deed of compromise dated

22-7-1940, was not binding upon the plaintiff, Mt. Kausilla Devi, and directed that the defendants should deliver to her the property in suit, that is, certain plots of land described as the Sag Bari and Nudah Umar Khan groves.

[19] It appears that part of the land is used for cultivation and part of it is planted with trees. This land was transferred to Swami Bal Krishna by the nephew and grand-nephews of the plaintiff's husband by means of a deed of sale executed in August 1936 for a sum of Rs. 10,000. Of this a sum of Rs. 9,000 was paid in cash partly as earnest money and partly at the time of registration and the remaining Rs. 1,000 was the subject of a promissory note executed by the vendee in favour of one of the vendors. Swami Bal Krishna was the defendant when the suit was instituted on 24-9-1940. He was impleaded in his own right and as the sarbarahkar of Sri Radha Krishnaji Maharaj. He died while the suit was pending and is now represented by his sons and grandson against whom the decree was passed and who are the appellants before us.

[20] The plaintiff's case was that the sale was a benami transaction, that she had supplied the consideration and that it was intended that she should be the owner of the property. The reason given was that Swami Bal Krishna was her spiritual preceptor (guru) and that he persuaded her to buy the property in his name because her relations would be reluctant to transfer it to her. She alleged that she was particularly anxious to acquire this land because her husband and son, who were both dead, had been very interested in it. It is not denied that Bal Krishna remained in possession of the groves after the purchase although the plaintiff alleges that he was acting merely as her manager or agent. Disputes arose between the plaintiff and Bal Krishna in the year 1940. It was alleged in the plaint that she objected to his selling the fruit of the trees to a man called Nabi Bakhsh, but when she was examined as a witness on commission she said that she was displeased with him because he had cut down half the trees in the groves. She has said that she sold the fruit to another man and there was consequently some controversy between the parties. We have on our record a complaint by Nabi Baksh dated 9-5-1940 in which he charged Bal Krishna with cheating, saying that Bal Krishna had sold him the fruit although another man was in possession of it. Bal Krishna made a complaint on 6-6-1940 against two employees of Mt. Kausilla saying that they had committed an offence of dacoity under S. 395, Penal Code, by forcibly removing some *arhar* from his threshing floor. He mentioned in this complaint that Mt. Kausilla Devi had been making a groundless claim to the Sag Bari grove and had



been trying to enter into wrongful possession by the use of force.

[21] He also mentioned that he had given information under S. 145, Criminal P. C. The application in which he gave this information is upon our record. We find that there was a settlement on 22-7-1940 and that Mt. Kausilla and Bal Krishna executed the document which is the subject of the learned Judge's decree for declaration. This may be described either as a deed of compromise or as a wakfnama. It recites that Mt. Kausilla Devi had bought the property in dispute with her own funds and the funds of her daughter-in-law, Mt. Ganga Devi, since deceased, in order to create a waqf in favour of Sri Thakur Radha Krishnaji Maharaj, an idol procured by her and in her possession. It also recites that disputes had arisen about the ownership and possession of the property and that cases under S. 145, Criminal P. C., and S. 395, Penal Code, were pending. It goes on to say that the parties did not wish to carry on any litigation but wished to settle the dispute about the ownership of the property. Both parties then declared that they had created a waqf of the property in favour of Sri Thakurji Radha Krishnaji Maharaj on certain conditions of which the important ones are that Bal Krishna would be the manager and Sarbarahkar of the property, that Mt. Kausilla and her heirs and representatives would not interfere with his management, that he should take the idol to his house in Bindraban on the Dasehra day and instal it there, that he should use the profits of the property in his discretion for religious purposes, that he should use any balance to pay off the debts incurred for the purpose of acquiring the property, that he should nominate a person to succeed him as manager and Sarbarahkar and if he made no nomination his successor should be the manager after his death and that he would have the cases in the criminal Courts struck off.

[22] In spite of this agreement the plaintiff instituted the suit which has given rise to this appeal and contended that the agreement was not binding upon her for various reasons. One of these reasons was that the plaintiff, who was a pardanashin woman, had acted under the influence of Bal Krishna and that she had no opportunity of getting independent advice. The learned Judge of the Court below found that there was no force in this contention. It was admitted by the plaintiff that she had been advised by Surya Prakash, a lawyer practising in Bareilly, who was married to her granddaughter. It also appears from the certificate of registration that her sister's son and an old servant of the family were with her at the time. The learned Judge has pointed out that she and

Bal Krishna were not at that time on the best of terms and that he could not have brought any influence to bear upon her. In my judgment the conclusions of the learned Judge are right. I have no doubt that the plaintiff had plenty of independent advice upon which she acted and that she entered into this agreement of her own free will.

[23] The learned Judge has found that the document was not binding upon the plaintiff for two reasons. One was that the original defendant had promised to withdraw the criminal cases, a promise which the learned Judge apparently thought was unlawful or contrary to public policy. The other was that the wakfnama could have no effect because there was no idol in existence at the time to whom the property could be dedicated. The learned Judge also found that the plaintiff had supplied the consideration for the deed of sale and that she had acquired a title to the property by means of that deed.

[24] In logical sequence the first question to consider should be whether the plaintiff had acquired title to the property by the deed of sale, but, as this question depends in a great measure upon the terms of the compromise, it is more convenient to deal with the latter first.

[25] In considering the question whether the agreement was vitiated by the promise to get the criminal proceedings struck off the learned Judge without further discussion has said "It is therefore obvious that she had agreed to come to terms in order that criminal proceedings may be put an end to. On this ground alone the compromise was liable to be set aside." He has assumed that the problem is a simple one whereas in my judgment it is very complicated.

[26] In the first place, a distinction must be made between a promise not to give information about the commission of an offence and a promise to put an end to a prosecution which has already been originated. In the matter of giving information the Legislature in India has laid down the law quite clearly in Ss. 44 and 45 Criminal P. C. The duty on the ordinary citizen is confined within somewhat narrow limits. He is bound to give information only about offences of sedition, rioting, homicide, robbery, dacoity, arson and burglary. The Legislature is presumably the best judge of public policy and it may be assumed that it was not thought advisable in the circumstances of this country to require an ordinary citizen to give information about offences other than those which I have mentioned. A promise not to give information about those offences would amount to a promise to commit a criminal offence and consequently would necessarily be an unlawful consideration. It may be open



to question when the matter is one of statutory provision whether it would be contrary to public policy to make a promise not to give information about other offences. The law doubtless would not countenance any form of blackmail or extortion and I suppose there can be no doubt that the law would not enforce a contract which was the result of a threat of exposure or a threat to make a false charge. In the matter of withdrawing prosecutions it is to be observed that under the provisions of Criminal Procedure Code it does not rest with any private person to decide whether a trial shall continue or not except in so far as the law allows a complainant to compound an offence. It is perhaps too generally assumed that a criminal trial based on a complaint is a contest between the complainant and the accused, but that assumption is not justified by the provisions of Criminal Procedure Code at least in warrant cases. Section 252, Criminal P. C., is in the following terms:

"(1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant, if any, and take all such evidence as may be produced in support of the prosecution . . . . .

(2) The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution and shall summon to give evidence before him such of them as he thinks necessary."

[27] It will appear that the burden is upon the Magistrate to enquire into the question whether an offence has been committed and to take action as a result of his inquiries. Except in so far as he is required to give the necessary information to the Magistrate about the witnesses and to give evidence, if necessary, the complainant has nothing further to do with the conduct of the prosecution. He may, of course, if the law allows, compound the defence in which case the person accused is entitled to be acquitted. It is necessary here to observe that the word 'compound' is not used in the same sense in the English and the Indian law. In the English law, as I understand the matter, the word means to receive an advantage in consideration of a promise to withhold information about the commission of an offence. In India it means to exonerate the offender. It has been suggested that it is unlawful to compound an offence which is not compoundable by law, but here again there is some confusion about the meaning of the term 'unlawful.' To compound an uncompoundable offence is unlawful in one sense of the term in that it cannot be done, but it is not unlawful in the sense that it is positively forbidden by law. It is not an offence or a wrongful act of any kind to receive reparation for an injury done in the course of an offence to the

person who receives reparation. In some cases it may happen that a promise to compound is, in substance, a promise to commit perjury or to withhold information which a complainant is bound to supply and that would doubtless be an immoral promise which could not support a contract or it may be that a criminal prosecution is launched by way of extortion and in that case again the Courts would not support a contract which was based on a promise not to press the prosecution. Learned counsel for the respondent has drawn our attention to illustration (h) to S. 23, Contract Act, which is in the following terms

"A promises B to drop a prosecution which he has instituted against B for robbery and B promises to restore the value of the things taken. The agreement is void as its object is unlawful."

[28] I have already pointed out that there would be no such thing as dropping a prosecution on a charge of robbery. A promise to drop such a prosecution might be a promise incapable of execution and as such might not support a contract, but in so far as it is a real promise I think that the illustration must not be taken too literally in view of the criminal law upon the subject. If A's promise was in substance one to give false information or to withhold information or commit perjury so as to hamper the administration of justice it would doubtless be an unlawful promise and any contract which A was seeking to enforce would be unenforceable, but it is to be noted that the illustration deals with a case where an offence of robbery has in fact been committed.

[29] Then our attention has been drawn to the case in (1892) 1 Ch. 173<sup>10</sup> in which the Court of appeal refused somewhat reluctantly to enforce a promise to make restitution on behalf of a person who had been guilty of embezzlement because the learned Judges found that part at least of the consideration was promise by the Building Society not to give information of the offence committed. Learned counsel has relied particularly upon the remarks made by Bowen, L. J., that it is a moral duty to prosecute for an offence and that the exercise of that duty should not be made a matter of private bargain. In my judgment remarks of that kind must be taken in their context and it is to be noticed that that was a case where a criminal offence had undoubtedly been committed.

[30] Learned counsel has also referred to the case in 57 Cal. 1302<sup>11</sup> but though their Lordships referred to the case which I have just mentioned, the case before them was one in which they held that the threat of a criminal prosecution had been the real occasion of the reference to arbitration with which they were dealing and



that there was no bona fide reference for the settlement of civil disputes.

[31] Considering the matter in all its aspects I am of opinion that each case must be decided upon its merits and that the Courts should look to the substance of the agreement between the parties. If there is any suspicion of blackmail or extortion or if the contract was based upon a promise really to hamper the administration of law so as to prevent investigation into a criminal charge which was of interest not only to the persons concerned but to the public at large, then I have no doubt the contract should not be enforced. If, however, there is a bona fide civil dispute which the parties have decided to settle and there happen to be subsidiary proceedings in a criminal Court, it seems to me that it would be contrary to public policy and to justice and equity to allow any person to escape his proper legal liabilities on the mere technical ground that there was some understanding that those criminal proceedings would not be pressed to a conclusion.

[32] In order to examine the case before us in the light of these observations it is necessary to enquire whether, in the first place, the agreement which the respondent wishes to avoid was forced from her because she was really afraid of the result of the criminal cases. In so far as the case under S. 145, Criminal P. C., is concerned that was not a case involving any criminal charge. That section, in so far as it is relevant, is in the following terms :

"Whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land . . . . he shall make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person or by pleader . . . . and to put in written statements of their respective claims : . . . ."

[33] When Bal Krishna suggested that the Magistrate should exercise his powers under this section he was merely giving the information to which the section refers and it is obvious that it could, in no sense, be contrary to public policy that persons concerned in a dispute about land should settle their dispute so as to avoid any future danger of a breach of the peace. The provisions of S. 145 deal with an inquiry primarily into possession over property in dispute and they are of a quasi civil nature. There is nothing in them which should cause any apprehension which would vitiate an agreement to settle the disputes between the parties.

[34] The other charge was certainly one of dacoity under S. 395, Penal Code, but it was a charge of a purely technical nature. Dacoity properly so-called is a very serious offence of

which the police would not hesitate to take cognizance. The police had refused to take cognizance of this so-called offence and it is quite clear that they thought that no criminal liability was involved. Bal Krishna had already informed the Magistrate that there was a dispute about the property and it must have been evident that nobody could seriously think that a real offence had been committed. Mt. Kausilla was not herself charged at that stage with having instigated any real dacoity and as she had the advice of a lawyer who was related to her, she must have been well aware that any threat there was purely an empty one. I do not believe that the agreement which she wishes to avoid was extorted from her in any sense of the term. That being so, I think that the recitals in the agreement must be given due weight. I believe that they set forth the real truth of the matter. I have no doubt that Mt. Kausilla and her daughter-in-law provided part of the money which was used to acquire the property, that is a sum of Rs. 4,000. A further sum of Rs. 5000 was admittedly obtained from a third party in whose favour Bal Krishna executed a mortgage by which he pledged the property in suit. I believe that there really was a dispute about the right to manage the property. Mt. Kausilla doubtless thought that she should have some influence because she and her daughter-in-law had provided the sum of Rs. 4000 and the remaining debt was to be paid out of the proceeds of the property. Bal Krishna, on the other hand, probably thought that he was to use the proceeds of the property according to his own discretion and that Mt. Kausilla should not interfere in his management. There was no question of Mt. Kausilla paying anything to Bal Krishna by way of reparation for the removal of the *arhar* from the threshing floor. There was merely an agreement that the property should in future be devoted to religious purposes connected with the idol. I think this was a real civil dispute between the parties and that the so-called criminal proceedings which were not in any real sense criminal at all were merely a subsidiary matter. This was doubtless regarded as a somewhat unpleasant dispute between a Hindu lady and her spiritual adviser connected with an idol and it was thought that it would be more dignified and respectable to settle out of Court and to avoid any further legal proceedings whether in the criminal or civil Courts which would lead to publicity. In these circumstances I do not think that the agreement should be held to be void because Bal Krishna agreed not to press proceedings in the criminal Courts. There is no reason to suppose that he tacitly agreed to make any false



statement or to hamper the Magistrate in any way if the Magistrate wished to make further inquiries, which he was very unlikely to do in the circumstances, as this was a charge which the police had refused to investigate. In my judgment, therefore, the agreement was perfectly valid. It was not an agreement in favour of Bal Krishna personally although doubtless the latter might have obtained considerable advantage from it.

[35] The other ground given by the learned Judge for holding that the agreement was void does not seem to me to be a good one. The learned Judge's argument depends in the first place upon a finding of fact that there was no idol in existence. The evidence produced by the plaintiff is not of much value. Mt. Kausilla has herself given evidence and she is supported by witnesses who are clearly not impartial. On the other hand, we have her own admission in the agreement that the idol did exist. Even if the agreement cannot be enforced that is no reason for holding that the recitals in it are untrue. There seems to be no reason why the existence of an idol should have been asserted if the idol did not in fact exist. It would have been quite easy for the parties to come to an agreement that the wakf should be created in favour of some other existing idol. Bal Krishna was a recognised guru who had a number of disciples and it is extremely improbable that there were no other idols in existence in which he would be interested. It is to be noticed that his address as given in the plaint is the Gher or enclosure of Sri Radha Ramanji Maharaj in the city of Muttra. Behari Lal, one of the sons of Bal Krishna, has given evidence in the case and has said that the idol to which the property was dedicated was in fact taken by Bal Krishna to his house in Bindraban. In view of the fact that the suit was instituted before the date when the idol was supposed to have been taken away from the custody of Mt. Kausilla this story is probably untrue, but it does not follow that the idol did not exist. I would hold, therefore, that it is not proved that the idol was not in existence.

[36] Even on the assumption that there was no idol in existence at that particular time, the authorities are to the effect that a religious settlement in favour of an idol is not necessarily void because the particular idol which is to be installed has not been procured or installed at the time when the dedication is made. I may refer to the case in 37 Cal. 128.<sup>4</sup> It is doubtless true that dedication to an idol which is a pure fabrication in the sense that it never existed and was never intended to exist would be void but there is no reason why a dedication should be

void when the intention of a party is to make a real dedication merely because at the time of dedication a particular idol to whom the property is to be dedicated has not been installed. If the question arose about the vesting of the property in the meanwhile it would doubtless be held that it vested in some person in the meanwhile in trust for the idol. Learned counsel has referred us to the cases in 25 Cal. 405,<sup>5</sup> 29 Cal. 260,<sup>6</sup> 30 Cal. 521,<sup>7</sup> but these have been overruled by the case which I have already quoted and there are two cases of this High Court, namely, 33 ALL. 253<sup>8</sup> and 53 ALL. 710<sup>9</sup> which support the contention of the appellant. Learned counsel has also referred to the cases in 40 Cal. 232<sup>12</sup> and 46 Cal. 951.<sup>13</sup> These were cases in which it was held that grants to an idol or a God were bad for vagueness and uncertainty. In the latter case however the transfer was to a Bairagi generally for the service of a God and it was held that the Bairagi was the owner of the property, not that there had been no valid transfer. In my judgment the plaintiff failed to prove that the compromise or wakfnama was not binding upon her.

[37] I will now deal with the other point, namely, whether the sale deed in favour of Bal Krishna was benami in the sense that it was understood that the property should be purchased for the benefit of Mt. Kausilla and she was intended to be the real owner of it. This is clearly not a case of an ordinary benami transaction in which a purchaser buys property in the name of another with the intention that he should have the beneficial interest in it. There seems to be no valid reason why Mt. Kausilla should have deceived her own relations or why these relations should have refused to transfer the property to her if they intended to transfer it at all. It seems to me that all the circumstances suggest that the allegations made in the deed of compromise or wakfnama are true and that the real intention was that the property should be acquired for religious purposes. I agree with the learned Civil Judge that the cash consideration apart from the money borrowed came from Mt. Kausilla and Mt. Ganga Devi, her daughter-in-law. It does not appear that Bal Krishna had any property which would have supplied him with sufficient money to acquire the groves in dispute and it is impossible to believe that Mt. Kausilla would have made any claim at all if she had not been concerned with the purchase of the property in some way or that Bal Krishna would have succumbed to the extent of agreeing that she had supplied the money for the purchase of the property if she had not done so.

[38] In my judgment, however, the origin of the money is not the sole consideration. If the



purchase had been made benami in the name of Bal Krishna merely to deceive the vendors there is no reason why he should remain in possession of the property after the purchase. He was not the natural person to act as the agent or manager of Mt. Kausilla who clearly had other servants and supporters. In my judgment he was put in charge because the intention was that the property should be purchased for the benefit of the idol, that is, for religious purposes. Apart from the statement of Mt. Kausilla that she used to benefit in some measure by the produce of the land there is nothing to suggest that she was ever intended to have any beneficial interest in this property. All the circumstances point to the conclusion that this was not a pure secular benami transfer but that it was a transfer intended from the beginning to benefit the idol or for some religious purposes. I think it an essential element in a benami transaction that the person who claims the property should show that he was intended really to be the owner. At one time a benami transaction was regarded as being one in the nature of a trust, 6 M. I. A. 53<sup>14</sup> and 13 M. I. A. 232,<sup>15</sup> and the benamidar was deemed to hold the property in trust for the real purchaser. A similar view was expressed in A. I. R. 1936 Rang. 256.<sup>16</sup>

[39] It seems to me that the question whether the person who has supplied the consideration is to be treated as the owner of the property really depends upon the intention at the time of the purchase. If there is nothing else it may be presumed that the person who supplied the consideration and in effect purchased the property was intended to be the real owner, but there may be circumstances which rebut this presumption. If A pays a sum of money to B and B in consideration, thereof transfers some land to a school or hospital, it surely would not be presumed in the absence of other evidence that this was a benami transaction and that A was intended to be the real owner of the land. If both Mt. Ganga Devi and Mt. Kausilla supplied the consideration it is unlikely that they were to be joint owners without specification of shares. In the case before us I am satisfied that it was not the intention at the time of the purchase that Mt. Kausilla should have a beneficial interest in the property and consequently I should hold that the property vested in Bal Krishna. Whether it vested in him in his personal capacity or in trust for any idol or for any religious object is a matter with which in this case we are not particularly concerned although I have no doubt that he was intended to use the profits from the property as a religious man for religious purposes.

[40] I am not satisfied that Mt. Kausilla ever acquired a title to the property and consequently

I would allow the appeal and dismiss the suit with costs in both Courts.

[41] **By the Court**—As we are not in agreement, we direct that the following questions shall be referred to a third Judge, namely,

(1) Whether Mt. Kausilla Devi became the proprietor of the property in dispute under the sale deed executed in favour of Bal Krishna?

(2) Whether the deed of wakf or compromise dated 22-7-1940, is binding upon Mt. Kausilla Devi?

(3) Whether the wakf is valid?

[42] **Verma J.**—This is a defendants' appeal from a judgment and decree of the Civil Judge of Bareilly decreeing the suit of the plaintiff-respondent, Mt. Kausilla Devi. It was heard by a Bench composed of Allsop and Mathur JJ. There was a difference of opinion between those learned Judges and consequently, under para. 27, Letters Patent, they stated the points on which they differed and those points have been referred to me. They are as follows:

"(1) Whether Mt. Kausilla Devi became the proprietor of the property in dispute under the sale deed executed in favour of Bal Krishna?

(2) Whether the deed of *waqf* or compromise dated 22-7-1940, is binding upon Mt. Kausilla Devi?

(3) Whether the *waqf* is valid?"

[43] The facts are fully stated in the judgments of the learned Judges who heard the appeal and I do not consider it necessary to repeat them. I may, however, for facility of reference, state that the admitted pedigree of the plaintiff's family is embodied in a statement of parties' pleaders (paper No. 104A) and is to be found at p. 32 of the paper book. The executants of the sale deed of 16-8-1936, (Ex. D), by which the property in question was conveyed to the original defendant, Goswami Balkrishna, for Rs. 10,000, were Ram Gopal (son of Makund Prasad), Ram Kumar and Shanti Kumar (sons of Ram Das), and Krishna Kumar and Jagdish Kumar (sons of Shyam Sunder Lal, who was a brother of Ram Gopal). It has been stated before me that these executants of the sale deed were all the male members of the family in existence at that time. Jagdish Kumar was a minor and was made an executant under the guardianship of his brother, Krishna Kumar, and that fact also leads to the same conclusion.

[44] The case has been argued before me at length and I have been taken through the entire record. I have, further, perused the judgments of the learned Judges who heard the appeal and have taken time to consider my judgment. After giving due weight to the arguments addressed to me and carefully considering the reasons given by the learned Judges, who heard the appeal, for their respective opinions, I have reached the conclusion that the questions referred to me



should be answered in the way which Allsop J. answered them; in other words, that question (1) should be answered in the negative, question (2) in the affirmative and question (3) also in the affirmative.

[45] As I am in agreement with practically all that Allsop J. has said in his judgment, it is not necessary for me to state in detail the reasons that have led me to the conclusions at which I have arrived. I may, however, say a few words in modification or amplification of the judgment of Allsop J.

[46] A slight error—of no importance whatsoever so far as the merits go — had better be corrected at once. The appeal in this Court has been filed only by the two sons of Goswami Balkrishna, and the grandsons—being the minor sons of appellant 1 — have been shown as respondents *pro forma*.

[47] As I have said above, I agree with all that Allsop J. has said in his judgment on all the essential questions that arise in the case, namely, (a) the question of *benami*, (b) the question whether an intention to drop or stifle any prosecution formed a part of the terms upon which the settlement of 22-7-1940, was based, and (c) the question of the existence or non-existence of the idol of Shri Thakurji Radha Krishnaji Maharaj and, in either case, the effect on the validity of the *wakf* created by the deed of 22nd July 1940.

[48] As to (a), the learned Civil Judge was of the opinion that the entire consideration for the sale deed of 16-8-1936, had been provided by Mt. Kausilla Devi. Mathur J. seems to agree with this opinion. Allsop J. has come to the conclusion that, out of Rs. 9,000 which were paid in cash (2,000 as earnest money and 7,000 at the time of registration of the deed), Rs. 4,000 must be taken to have come out of the pocket of Mt. Kausilla Devi. The reasons for this apparently are, on the one hand, that Rs. 6,000 out of the total consideration of Rs. 10,000 were admittedly raised by Balkrishna by means of two transactions, *viz.*, a deed of simple mortgage in favour of certain persons for Rs. 5,000 and a promissory note for Rs. 1000 in favour of one of the vendors, both executed by Goswami Balkrishna, and, on the other, that it had not been shown by the defendants that Goswami Balkrishna was a man of substance and that therefore Rs. 4,000 must be taken to have been found by Mt. Kausilla Devi. I may, however, point out in this connection that the onus of proof lay on the plaintiff and that there is really no credible evidence produced by her to prove that she was possessed of funds and that she did actually pay Rs. 4000. She herself is not a witness of truth and I have not the slightest hesitation in rejecting the evidence given

by her. Her witnesses are no better. Goswami Balkrishna unfortunately died shortly after the institution of the suit and it is not possible to say what evidence he would have given if he had been alive. As I have said above, there was no burden on the defendants and I am not satisfied that it is right to record a finding in favour of the plaintiff on the ground that the defendants have failed to produce evidence on a point with regard to which no burden lay on them. In any event, it appears to me that the finding that the entire sale consideration came from the pocket of Mt. Kausilla Devi is clearly not sustainable. It was Balkrishna who executed the promissory note for Rs. 1,000 and it was he, and he alone, who was liable for the repayment of the loan to the creditor. The deed of simple mortgage was also executed by Balkrishna and, although one of the remedies available to such a mortgagee is to put the property to sale, there is also a personal liability of the mortgagor. That these debts were ultimately paid out of the profits of the property does not destroy the fact that at the time of the execution and registration of the sale deed in August 1936, Rs. 6,000 out of Rs. 10,000 were found by Goswami Balkrishna by raising loans for which he was personally liable.

[49] Even accepting the finding that Rs. 4,000 did come out of the pocket of Mt. Kausilla Devi, it does not necessarily follow that the intention was that Mt. Kausilla Devi should become the proprietor of the property in dispute or that she did, as a matter of fact, become its proprietor. Allsop J. has dealt with this matter in detail and I do not consider it necessary to do more than refer to the following cases, which were cited by the appellant's counsel, in support of the conclusion to which Allsop J. came : 26 Cal. 227<sup>17</sup>; 6 Luck. 556<sup>18</sup> at p. 571-3 and A. I. R. 1934 Mad. 671.<sup>19</sup> I entirely agree with the conclusion of Allsop J. that it was never the intention that Mt. Kausilla Devi — or, for the matter of that, Goswami Balkrishna — should be the owner of the property and that it was intended from the very beginning that the property would be dedicated to Shri Thakurji Radhakrishnaji Maharaj and should be devoted to religious purposes. I may add that Mt. Kausilla Devi has stated that her "men folk" — in other words, her deceased husband and her two deceased sons — "liked" the property in suit "very much". The natural inclination of a Hindu widow, in these circumstances, would be to dedicate such property for religious purposes—an act which would not only bring religious merit to herself but would also benefit the souls of her deceased husband and sons. The first step, according to Hindu law, in a dedication is the *sankalp* i. e., the resolution to make a dedication. In view of all the facts



and circumstances, I have no hesitation in holding that such a *sankalp* was made by Mt. Kausilla Devi on the day on which the property was acquired, namely, 16th August 1936. In my judgment, the property became the deity's on that very date and the position of Goswami Balkrishna (and that of Mt. Kausilla Devi, if it be held that she had any sort of title to the property) was nothing more or less than that of trustees.

[50] Coming now to question (b), here again I find myself in agreement with what Allsop J. has held. Having regard to all the facts and circumstances, I am satisfied that the dispute between the parties was entirely of a civil nature. Reference may also be made to the statement to that effect in clause (6) of the deed in question. What appears to have happened was this. Goswami Balkrishna was in possession of the property and was managing it. Mt. Kausilla Devi did not like something which he did. It is also possible that she thought that Balkrishna was behaving in a manner which was inconsistent with the position of a trustee and was acting as if he were the owner of the property. In these circumstances, she purported to sell the fruit of the trees to some one other than the man to whom Balkrishna had sold it, and the harvested crop of the portion of the land which was cultivated was removed by certain persons, apparently under her orders. Balkrishna first filed an application in the Magistrate's Court under S. 145, Criminal P.C. He followed it up with a complaint under S. 395, Penal Code, stating that certain men in the employment of Mt. Kausilla Devi had removed the crop and alleging that they had thereby committed dacoity. Kausilla Devi sent a notice (Ex. 6) to Balkrishna, alleging that she was the owner of property and that Balkrishna was merely her *benamidar* and calling upon him to execute a deed of relinquishment in respect of the property within three days and to return all the title deeds, accounts etc. to her, and Balkrishna sent a reply (Ex. 7) asserting his own title to the property. Both parties were making false assertions of title and were suppressing the truth, namely, that the property did not belong to either of them but that it had been set apart, and placed in the charge of Balkrishna as a trustee, for dedication to the deity. Subsequently they came together—whether they themselves realised that what they were doing was wrong or others intervened and made them see it—and the settlement evidenced by the deed of 22-7-1940, was the result.

[51] In the plaint the attack on the settlement was based on undue influence exercised upon the plaintiff by Balkrishna, and the fact that the plaintiff was an aged *pardanashin*

woman was emphasised and it was alleged that no "independent advice" was available to her—paras. 11, 12 and 13 (B) of the plaint. The point that the settlement was bad because its object, or one of its objects, was the dropping or stifling of a prosecution was not even mentioned. The learned Civil Judge held that the plaintiff's allegation of undue influence was without foundation and, further, that independent advice in ample measure was available to her. These findings have been accepted by both the learned Judges who heard the appeal. It may be pointed out that the most important person who was advising the plaintiff at that time is Mr. Surya Prakash, who is not only a relation of the plaintiff—having married her grand daughter—but is also a lawyer. It is noteworthy that this gentleman has not thought fit to come into the witness-box. The story related by Mt. Kausilla herself as to her physical and mental condition at the time of the execution and the registration of the deed dated 22-7-1940, is palpably false. It was only at the time of arguments that it was contended that the settlement must be held to be bad on the ground that one of its terms or objects or results was the dropping of a prosecution. This plea was accepted by the Court below on the ground, briefly, that, as the plaintiff was a woman belonging to a respectable family, she must have been frightened by the prospect of being dragged to the criminal Court and of, possibly, being sent to jail. It appears to me that there is a certain inconsistency between the findings of the Court below. On the one hand, it is found that Balkrishna was not in a position to exercise any influence on the plaintiff and that Mr. Surya Prakash—besides others—was advising her. On the other hand, it is held that the mere fact of the filing of a complaint, alleging that certain crops had been removed by the plaintiff's employees and that consequently dacoity had been committed, frightened not only Mt. Kausilla but also Mr. Surya Prakash out of their wits, so much so that they at once surrendered and agreed to this settlement.

[52] I find it difficult to agree with the conclusion that the settlement was the outcome of any fear operating on the mind of Mt. Kausilla. In the first place, the impression left on my mind as the result of a perusal of her evidence is that she is not one of those *pardanashin* women who are helpless and who can be frightened or imposed upon. She was examined on commission and the learned Civil Judge was not in a better position than we are in appraising the worth of her evidence. She, on her own showing, is a lady who knew her rights and was capable, not only of ordering her servants to



look after her interests, but also of going down to the property in person to see things for herself and of taking suitable action. She was obviously a woman of personality and one who would not be trifled with. She is also, as I have shown above, a person capable of inventing and relating on oath a false story. Then, there was Mr. Surya Prakash, a lawyer. I find it impossible to believe that he could have had any difficulty in seeing that the offence of dacoity which had been alleged in the complaint was, at the most, a purely technical one and that Mt. Kausilla Devi ran no risks whatever. So far as the application under S. 145, Criminal P. C., is concerned, it is obvious that it was not a prosecution at all. I have, in all these circumstances, no hesitation in agreeing with Allsop J., that the finding of the learned Civil Judge is wrong. Allsop J. has dealt with the case in 57 Cal. 1302,<sup>11</sup> relied upon by the respondent, and I do not consider it necessary to add anything to what he has said.

[53] Learned counsel for the appellants contended that, in any event, the matter having gone beyond the stage of contract and having culminated in a conveyance in the shape of the dedication embodied in the deed dated 22-7-1940, illustration (b) to S. 23, Contract Act—on which reliance was placed on behalf of the plaintiff—respondent—was not applicable. He cited the decisions in 42 Cal. 286<sup>20</sup> and 20 C. W. N. 760.<sup>21</sup> He also relied on a passage in the judgment of Bowen L. J. in (1892) 1 Ch. D. 173<sup>10</sup> at p. 185. Learned counsel for the respondent has, in reply, relied on cl. (b) of S. 6, T. P. Act, and has cited the cases in 58 Cal. 1235<sup>22</sup> and 50 Cal. 929<sup>23</sup> at p. 937. Learned counsel for the appellant raised the objection that no reference was made before the Bench by the respondents' counsel to S. 6 (b), T. P. Act, and to the cases in 58 Cal. 1235<sup>22</sup> and 50 Cal. 929<sup>23</sup> and stated that before the Bench reliance was placed on S. 4, T. P. Act, which, he submitted, was inapplicable. The objection was that these arguments were not now open to the respondent's counsel. In view, however, of the finding at which I have arrived in the preceding paragraph of this judgment—which is sufficient for the disposal of this part of the case—I do not consider it necessary to pronounce upon these contentions.

[54] With regard to question (c), I agree with Allsop J. in holding that the allegation of the plaintiff that the idol in question did not exist is wrong. In addition to what Allsop J. has said with regard to this matter, I may point out that it was not alleged in the plaint that the idol did not exist. All that was stated was that "no idol was permanently installed at any place"—para. 13 (B) (d). It was only when

the plaintiff came into the witness-box that she stated that the idol did not exist at all. In order to meet this difficulty, learned counsel for the respondent has contended that the allegation in para. 13 (B) (d) of the plaint meant that the idol, though it existed, had not been duly consecrated. I do not find it possible to entertain this argument. In the first place, the word used in para. 13 (B) (d) of the plaint, which the translator has rendered as 'permanently installed', is *sthapit*. The meaning of that word is not consecrated, but seated, placed, established, etc. In the second place, in placing this interpretation upon the plaint, the learned counsel is completely ignoring the fact that the plaintiff herself stated in the witness-box that the idol did not exist at all, and not that the idol existed but had not been consecrated. The learned counsel's argument obviously runs counter to the plaintiff's statement. In the third place, no such interpretation appears to have been placed on the plaint and no such argument appears to have been advanced either in the Court below or before the Bench in this Court. It is clear to my mind that this contention as to consecration is an absolutely new contention which has been sought to be raised for the first time before me. It must, in these circumstances, be held to be without substance and untenable. It may be mentioned that the respondent's counsel sought to derive support for his contention from the fact that in cl. (3) of the deed dated 22-7-1940, it was stated that Balkrishna should take Shri Thakurji Maharaj to Brindaban on the Dasehra day and 'instal' Him in his house. The argument was that this showed that the idol had not till then been consecrated. Here, again, it is necessary to refer to the words used in the original. They are "virajman karega". The exact equivalent of 'virajman' is to be found in the Persian expression "raunaq afroz". It is difficult to give a precise translation in English of these Sanskrit and Persian expressions. I may explain, however, that they are used when one wishes to refer to the presence of some one for whom one has respect or veneration. Put in simple English, they mean 'seated', 'present', etc. In plain Hindustani, 'virajman' means 'maujud', 'baitha hua', etc. Thus the word used in the deed does not show that Balkrishna was directed to consecrate the idol after taking it to his house at Brindaban. It is obvious that the whole of this idea of consecration arose in the mind of the respondent's learned counsel for the first time when the case was argued before me.

[55] Furthermore, it appears to me that it is settled law that, in order that an endowment to the deity may be valid, it is not necessary that



the particular image or idol should be consecrated, or even in existence, at the date of the execution of the deed. It is sufficient if the property is set apart and is put in the hands of a trustee until the idol or image is procured, and consecrated, if necessary: 37 Cal. 128,<sup>4</sup> 32 ALL. 337,<sup>24</sup> 33 ALL. 253<sup>8</sup> and 53 ALL. 710.<sup>9</sup>

[56] Learned counsel for the respondent cited the case in 7 C. L. R. 278<sup>3</sup> and urged that it supported his argument. He further contended that the case in 29 Cal. 260<sup>6</sup> was not overruled by the Full Bench in 37 Cal. 128.<sup>4</sup> He even went to the length of suggesting that the Full Bench of the Calcutta High Court in 37 Cal. 128<sup>4</sup> had been overruled by the Privy Council in 44 Mad. 831<sup>25</sup> and referred to certain sentences in the judgment of Mukerji J., in 60 Cal. 452<sup>26</sup> and argued that they supported this suggestion of his. I consider it sufficient to say that there is no force whatsoever in any of these contentions.

[57] With regard to the question whether Balkrishna took the idol to his house at Brindaban or not, Mathur J. has held that the case of the defendants, that Balkrishna did take the idol, is "palpably false" because "the suit was instituted before the Dasehra day fixed for taking away the idol." Allsop J. on the other hand, has referred to the evidence of Behari Lal who said that the idol was in fact taken by Balkrishna to his house in Brindaban, and has observed that, "in view of the fact that the suit was instituted before the date when the idol was supposed to have been taken away from the custody of Mt. Kausilla," Behari Lal's statement is "probably untrue". It will be noticed that the two learned Judges are not entirely agreed upon this question of fact. My own opinion is that there is no reason for holding that Behari Lal's statement is necessarily untrue. In the first place, the language used in cl. (3) of the deed dated 22-7-1940, does not, in my opinion, mean that the idol was to be delivered by Mt. Kausilla to Balkrishna and the journey to Brindaban was to be performed by the latter on Dasehra day. It appears to me that what was laid down was that the installation or the keeping of the idol at Balkrishna's house at Brindaban was to take place on Dasehra day. It is improbable that the intention was that the delivery of the idol to Balkrishna, the journey to Brindaban and the installation should all take place on the same day. It is open to doubt if it could be accomplished in one day. The main idea, to my mind, must have been that the placing of the idol in a suitable place in Balkrishna's house should take place on Dasehra day. In this view of the matter, it is far more probable that the idol was made over by Mt. Kausilla to Balkrishna on the day on which the deed was

executed, i.e. on 22-7-1940. It is, in my opinion, probable that the idea of instituting the present suit was conceived later. In all likelihood, sometime after the execution and registration of the deed dated 22-7-1940, some promoters and fomenters of litigation, who unfortunately are present in every district, got busy. I do not believe Mt. Kausilla's statement that even while she was executing and registering the deed she was mentally registering the resolution to challenge it. In the second place, I have no hesitation in holding that Behari Lal is a far more reliable witness than Mt. Kausilla. In any event, the fact—if it be a fact—that Mt. Kausilla dishonestly withheld the idol from Balkrishna and instituted the suit and thus prevented Balkrishna from taking the idol to his house at Brindaban and placing it there cannot invalidate what, in my judgment, was a perfectly valid endowment when it was created.

[58] Some stress was laid on behalf of the respondent on the contents of cls. (2) and (4) of the deed dated 22-7-1940, wherein it was laid down that Mt. Kausilla Devi and her heirs and representatives would have no right to interfere with Goswami Balkrishna's management of the dedicated property and that Goswami Balkrishna would have the right to nominate the person who should succeed him as Sarbarahkar and that, in case of his failure to make such a nomination, 'the successor' of Balkrishna would be appointed the Sarbarahkar. It was argued that these terms of the deed showed that Mt. Kausilla was not a free agent in the matter of the execution of the deed. In my opinion there is no force in this argument. It must not be forgotten that Goswami Balkrishna was the Guru, i.e. the spiritual preceptor, of Mt. Kausilla Devi, and had been her Guru for forty years. The property was being dedicated to religious purposes. It is not unnatural, in these circumstances, that Mt. Kausilla should have desired that the Sarbarahkarship should remain in the hands of her Guru and, after him, in the hands of his nominee or disciple. The main thing was that the Sarbarahkar should have no power to alienate the property and that was laid down in clear language in cl. (8) of the deed.

[59] It only remains to notice a somewhat unintelligible argument put forward by the respondent's learned counsel towards the end of his address. He contended that, as the idol also was a party to the suit and as no appeal has been filed on its behalf, this appeal by the other defendants was incompetent or ineffectual. No such contention is mentioned in the judgments of the learned Judges who heard the appeal. In any event, O. 41, R. 4, Civil P. C., is a complete answer to this argument.



[60] For the reasons given above, I answer the questions referred to me as follows: (1) Mt. Kausilla Devi did not become the proprietor of the property in dispute under the sale deed executed in favour of Balkrishna. (2) The deed of *waqf* or compromise dated 22-7-1940, is binding upon Mt. Kausilla. (3) The *waqf* is valid.

[61] Let the case be laid, with these answers, before the Bench which had heard the appeal.

**Allsop and Mathur JJ.** — In accordance with the decision of the majority of Judges the appeal is allowed and the suit is dismissed with costs in both Courts. The cross-objection is consequently dismissed with costs.

D.S.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 332 [C. N. 127.]**

**MALIK AND WALI ULLAH JJ.**

*Henry Earnest Meaney and another—Defendants — Appellants v. E. C. Eyre Walker, —Plaintiff—Respondent.*

First Appeal No. 407 of 1943, Decided on 14-3-1946 from decision of Civil Judge, Dehra Dun, D/- 31-5-1943

(a) Contract Act (1872), S. 20—Mistake as to area sold—Agreement for sale of plot under impression that it was five bighas in area—Area found less on measurement — Building on area less than five bighas prohibited under municipal rules — Parties held under mutual mistake on essential matter—Contract is not enforceable. [Para 10]

(b) Contract Act (1872), Ss. 4, 7 — Offer and acceptance—Offer made in pursuance of invitation to offer—Conditional acceptance — There is no completed contract. [Para 11]

*M. N. Raina and D. D. Seth—*for Appellants.

*L. N. Gupta—*for Respondent.

**Malik J.** — This appeal has been filed on behalf of the defendants against a decree passed by the learned Civil Judge of Dehra Dun. The plaintiff filed a suit for specific performance of a contract and prayed that the Court be pleased to order the defendants to specifically perform the agreement and to execute and register a sale deed in favour of the plaintiff and to put him in full possession of five bighas of land. The defendants denied that there was ever any completed contract between the parties. They further pleaded that there was a talk of sale of a plot of land but as it was later found that the plot was less than five bighas in area and under the municipal bye-laws no building could be constructed in Dalanwala on land measuring less than five bighas, the negotiations fell through.

[2] The defendants appellants, who are husband and wife, jointly own a house known as Evelyndale in Dehra Dun on a compound of about ten bighas. The original intention was to divide the plot half and half and to build two houses, one on each portion. The plot in question

was a rectangular plot and was bounded on the north by Inder Road, on the south by Pretam Road and on the east and west there were houses of others. The original intention must have been to build one house facing Inder Road and the other house facing Pretam Road. The defendants, however, built the house Evelyndale facing Inder Road and never built a second house on the southern portion of the land. The defendants were in Dehra Dun till about the year 1938 when they went away to Ajmere. At the time when they left Dehra Dun they had an idea of selling the land to the south of Evelyndale which they thought was about five bighas in area and they put up a notice board on the Pretam Road that the land was for sale. It was sometime after the year 1938 that the plaintiff, Walker, became a tenant of the house Evelyndale and as intending purchaser used to come and make enquiries from him, his wife removed the notice board and put it in the garage.

[3] In the year 1941 the plaintiff came to know that there were other persons who were anxious to buy the land at the back of the house, Evelyndale and on 12-8-1941, the plaintiff's wife wrote a letter to Meaney, defendant 1, enquiring whether he was willing to sell "the land at the back" of the house. It is not necessary to refer to certain other correspondence that followed, but from those letters it is clear that both parties were thinking of the vacant land facing Pretam Road on which the defendants had originally the intention of building a second house.

[4] On 29-8-1941, Mr. Meaney wrote to Mr. Walker that he was willing to sell the land for Rs. 6000 and enquiring from him whether he was prepared to make an offer of Rs. 6000 for the same. The plaintiff in the plaint treated this as an offer by Mr. Meaney to sell the land to the plaintiff for Rs. 6000 and his reply by a telegram dated 31-8-1941, that he was "willing to pay rupees six thousand for land. Reply" as an acceptance of the offer.

[5] Learned counsel for the plaintiff has, however, admitted that the letter dated 29-8-1941, cannot be treated as a definite offer by the defendant of which the plaintiff made the acceptance by his telegram dated 31-8-1941. He has, to our minds, rightly urged that the letter dated 29-8-1941, was merely an invitation to offer and the telegram dated 31-8-1941, must be treated as an offer by the plaintiff to purchase the land for Rs. 6000. Learned counsel has, however, urged that this offer was accepted by the defendants on 1-9-1941. As we read the letter by Mr. Meaney to Mr. Walker dated 1-9-1941, we cannot say that it was an unconditional acceptance by Mr. Meaney. Mr. Meaney mentioned in this letter that he had received another offer for the land



from Sardarani Narinjan Kuar of Nabha, of the same sum of Rs. 6000 and before disposing of that offer he would like to know whether the Sardarani had a right of pre-emption. He further wanted to know whether there were other pre-emptors. He no doubt added that if none of the others wanted the land for Rs. 6000, Mr. Walker was welcome to have it but that he would like Mr. Walker to make enquiries and let him know. This cannot be treated as anything but a conditional acceptance at its best.

[6] It must be remembered that the parties were, one at Dehra Dun and the other at Ajmere, and if there was a competent contract between the parties it must be spelt out of the correspondence. If we take the letter dated 1.9.1941 as a conditional acceptance or, in other words as a sort of counter offer that if no one else had a right to buy and was willing to do so, the defendants would be glad to sell the land to the plaintiff, the plaintiff would have to prove that he accepted that fresh offer subject to the conditions given by the defendants. There is, however, no letter subsequent to 1st September 1941, on which the plaintiff can rely as an acceptance by him. The plaintiff wrote back to the defendant on 15th September 1941, that it would look awkward if he made enquiries in the absence of the defendants and that he would rather wait till the defendant came to Dehra Dun when the matter could be settled. Mr. Meaney went to Dehra Dun on or about 2nd October 1941. There is some controversy between the parties as regards a particular cheque which it is alleged was given by the plaintiff to one Dr. Mehta, but we do not propose to consider that matter as that, to our minds, is hardly of any importance.

[7] We know from the correspondence previous to 1st September 1941, that the defendant intended to sell the land facing Pretam Road which he had left for a second house and which he was under the impression measured about five bighas. The plaintiff was also under the impression that this land measured about five bighas. Attached to the letter dated 1st September 1941, the defendant sent to the plaintiff a rough sketch of the land to be sold which makes it quite clear what he intended to sell. It divides the land from the rest of the land on which stood Evelyndale by a straight line, so that the whole plot was divided into two rectangular plots, on one rectangle being the house Evelyndale with its outhouses, and the other being the vacant land to be sold which was to the south of Evelyndale. The parties along with Dr. Mehta who was a mutual friend went to the spot and what happened there on 4th October is perfectly clear from the evidence of Dr. Mehta, Mr. Walker the plaintiff, and Mr. Meaney. All

three of them practically agree on the point. We shall first mention what Dr. Mehta has to say about it. He states :

"The land in question was measured in my presence and was found to be less than 5 bighas and the deficiency could be made up, if Mr. Meaney parted with a piece of land on the north-east side of the land in question. Plaintiff objected to this shortage of land and wanted full 5 bighas . . . Mr. Meaney was telling the plaintiff at the time of measurements that the land was more or less 5 bighas . . . The talk was not finally finished on that day. The plaintiff wanted full 5 bighas of land, while Mr. Meaney did not agree to it and was prepared to give only that much land as was measured out and found less than 5 bighas. The sale deed was to be executed after the question as to measurements of land and the area of the land had been decided."

Dr. Mehta went on to say in answer to the Court that the land in question was measured and found less than five bighas, and in re-examination he said that at the time of measurements the plaintiff was insisting that he should have the remaining land on the north-eastern side, near the out-houses of Evelyndale, which was the name of the bungalow owned by Mr. Meaney on 12 Inder Road.

[8] We can well understand the reason why the plaintiff was insisting on his being given full five bighas and was not willing to take only the rectangular portion which the defendants wanted to sell and which the plaintiff had originally intended to purchase, as the land would have been of no use to him. According to the municipal bye-laws a plot which was less than five bighas could not be built on. The plaintiff towards the end of his cross-examination has said:

"I was not prepared to take the land without measurements, and the measurements have not been made as yet. The rectangular portion is less than five bighas. If it had been five bighas, I would take it and would not insist on taking the little land in continuity of the out-houses."

The defendant's evidence is practically to the same effect. He says:

"Until 3rd October 1941, I was under the impression that I was selling out five bighas of land to plaintiff for a price of Rs. 6000, which had been arranged with the plaintiff. The fact is that the execution and registration of sale deed did not come about, as the land on measurement was found to be less than five bighas and the plaintiff insisted to get full five bighas. If the little vacant land adjoining the out-houses towards the east had been sold to plaintiff, it would have completed five bighas, but I had not agreed to sell it as it is a part of the compound of Evelyndale."

[9] The position that emerges from a consideration of the evidence of these three witnesses is that the plaintiff and the defendant were both under the impression that the land towards the south facing Pretam Road was about five bighas in area. If the land had turned out to be five bighas in area, there would have been probably no difficulty and the defendants would have sold the land to the plaintiff for Rs. 6000. As it



turned out, however, the land was less than five bighas and the plaintiff wanted that the defendants should make good the deficiency by giving the plaintiff some land to the east of the out-houses of Evelyndale. This the defendants were not willing to do and the negotiations fell through.

[10] The view of the learned Judge was that, when the rectangular plot of land turned out to be less than five bighas, the defendants were bound to make good the deficiency by giving extra land from the vacant land adjacent to the out-houses so as to complete the area of five bighas. It would, however, be impossible for the Court to make a transfer of any such land without the agreement of the parties, as the Court would not be in a position to say what the length and the breadth of land that is to be transferred should be. After it was found that the land was less than five bighas, it appears that the plaintiff felt reconciled to the position that there was going to be no sale in his favour, which is quite clear from his letter dated 28th October 1941. He was, however, ill-advised to give a notice on 8th May 1942, and to file a suit for specific performance of contract claiming that five bighas of land should be sold to him which meant that the deficiency in the rectangular plot to the south should be made up by taking out some land from the compound of Evelyndale house. This is a case where the parties were contemplating sale of a plot of land under the impression that it was five bighas, while, as a matter of fact, the area was less. This would be a case of a mutual mistake as to a matter of fact essential to the agreement inasmuch as if the area was less than five bighas, the plaintiff would not be entitled to build on the land. The agreement, if any, would therefore, be void under S. 20, Contract Act, and not enforceable in law.

[11] Apart from this, we are of the opinion that there was no completed contract between the parties. We have already said that in the plaint the plaintiff alleged that the letter of Mr. Meaney dated 29th August 1941, was an offer and the telegram dated 31st August 1941, was the acceptance by which the contract was completed. In his arguments before us learned counsel for the plaintiff-respondent admitted that the letter of 29th August 1941, was nothing more than an invitation to offer and the plaintiff's telegram dated 31st August 1941, must be taken as a definite offer of purchase made on his behalf. We have already said that the letter of 1st September 1941 was not an absolute and unqualified acceptance of the offer as required by S. 7, Contract Act. In the letter there was no doubt an expression of the willingness to sell

the land to the plaintiff, but then it was qualified by the statement that the defendant would sell the land to the plaintiff if it was not wanted by others who might have a right of pre-emption. The plaintiff was not able to rely on any correspondence after 1st September 1941, for his argument that there was a completed contract between the parties. It was not till about 2nd October 1941, that the parties met when Mr. Meaney came to Dehra Dun. It is nobody's case that there was an oral contract entered into between the 2nd and 4th October. On 4th October we know that the plot of land which the defendants intended to sell and the plaintiff intended to purchase was measured and was found to be less than five bighas in area and the whole talk fell through.

[12] The lower Court has relied on the written statement and the defendant's statement for the finding that there was a completed contract between the parties. The defendant has no doubt stated and has not denied it that he was perfectly willing to sell the plot to the plaintiff, but the question whether there was a completed contract would depend upon the question whether there was a definite offer and a definite acceptance of the same as required by law. It was not pleaded in the plaint that there was an oral contract between the parties entered into between the 2nd and 4th October when Mr. Meaney was in Dehra Dun, nor has learned counsel for the plaintiff relied on any such oral contract. It is, therefore, not necessary for us to discuss the evidence of the plaintiff's witnesses in detail. Both in the plaint as well as in argument stress was laid on the correspondence between the parties and we have, therefore, to interpret for ourselves from a study of that correspondence whether we can uphold the finding of the learned Judge that there was a completed contract between the parties. Having carefully considered the letters and telegrams that passed between the parties, we have come to the conclusion that there was no completed contract for sale which could be specifically enforced.

[13] We, therefore, allow this appeal with costs. The decree of the lower Court is set aside.

D.R.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 334 [C. N. 128.]**

ALLSOP AND SAPRU JJ.

*Prag Datt and another—Objector—Appellants v. Hari Bahadur and others — Landlords—Respondents.*

First Appeals Nos. 233 and 381 of 1942, Decided on 5-2-1947, from decision of Special Judge, 1st Grade, Cawnpore, D/- 11-4-1942.



(a) Transfer of Property Act (1882), S. 58 (c) — Mortgage or sale—Sale subject to separate deed of agreement executed on same day for reconveyance.

A sale deed of 1915 specifically said that the property was sold subject to a separate deed of agreement for the reconveyance of the property. That separate agreement was evidenced by another document executed on the same date. It recited that the vendee had agreed to reconvey the property if the vendor repaid to him within eleven years the full price in a lump sum or in two instalments. It was also agreed that the vendee would not give up possession if the vendor paid half the price only and that the vendor would not be entitled to any interest on the half share paid nor would be entitled to claim a reduction in the profits of vendee :

*Held* that the two documents were evidence of one transaction and the transaction was mortgage by conditional sale and not a sale. [Paras 2 and 4]

(45-Com) T. P. Act, S. 58, N. 33.

[*Editorial Note:* The case relates to a deed of 1915, i. e. a date before the amendment of the Transfer of Property Act, 1929. Under the proviso to cl. (c) of S. 58 added to cl. (c) of S. 58 by Act 20 of 1929, it is now expressly provided that unless the condition for re-sale is embodied in the same document the transaction will not be a mortgage by conditional sale. This amendment, however, is not retrospective, so that it does not apply to transactions like the one in the present case which were entered into before the amendment.]

(b) Transfer of Property Act (1882), S. 58 (c) — Sale subject to separate deed of agreement for reconveyance—Intention of parties whether criterion for determining whether transaction is mortgage or sale. (*Quære*). [Paras 2 and 3]

*Cases referred :—*

1. ('90) 12 All. 387 : 17 I. A. 98 : 5 Sar. 551 (P. C.), Bhagwan Sabai v. Bhagwan Din.
2. (1900) 22 All. 149 : 27 I. A. 58 : 7 Sar 601 (P. C.), Balkishan Das v. Legg.
3. ('16) 38 All. 570:3 A.I.R. 1916 P.C. 49:43 I.A. 284: 36 I.C. 38 (P.C.), Jhandu Singh v. Wabiduddin.
4. ('24) 47 Mad. 729 : 11 A. I. R. 1924 P. C. 226 : 51 I. A. 305 : 82 I. C. 993 (P. C.), Narasingerji Jyanagerji v. Parthasaradhi.
5. ('11) 33 All. 337 : 9 I. C. 140, Ghulam Nabi Khan v. Niyazunnissa.
6. (1858) 2 De. G. & J. 97 : 6 W. R. 242, Alderson v. White.
7. ('23) 45 All. 581 : 10 A. I. R. 1923 All. 586:77 I. C. 572, Bishambhar Nath v. Mabomed Obaidulla.
8. ('19) 42 Mad. 407: 6 A.I.R. 1919 Mad. 1:50 I.C. 205 (F.B.), Muthuvelu Mudaliar v. Vythilinga Mudaliar.
9. ('29) 16 A. I. R. 1929 All. 174 : 116 I. C. 807, Mt. Mumtaz Begum v. Mt. Lachmi.

*P. L. Banerji, Gopinath Kunzru and B. R. Avasthi*  
— for Appellants.

*G. S. Pathak and Gopalji Mehrotra*  
— for Respondents.

**Allsop J.** — This appeal arises out of proceedings under the Encumbered Estates Act. Hari Bahadur and others made an application under S. 4 of the Act and mentioned in the list of their property, which they had to supply, a share of five annas and four pies in the village of Akbarpur Barni, Mahal Hori Lal. An objection was taken by Prag Datt and Mt. Ram Dulari, widow of Chheda Lal that they were the owners of the property. The property was transferred to Prag Dutt and Chheda Lal by Hori-

Lal, deceased the father of Hari Bahadur on 18.1.1915. The question at issue is whether this deed evidenced a sale or a mortgage by conditional sale. The learned Judge of the Court below held that the transaction was a mortgage, and there is an appeal before us by the objectors.

[2] Learned counsel for the appellants argued that the nature of the transaction must depend upon the intention of the parties and not upon the question whether the property was sold on any of the conditions mentioned in S. 58 (c), T. P. Act. The deed of sale dated 18.1.1915 specifically said that the property was sold subject to a separate deed of agreement for the re-conveyance of the property. That separate agreement was evidenced by another document executed on the same date. It recited that the vendees had agreed to reconvey the property if the vendor repaid to them, within 11 years, the full price in a lump sum or in two instalments. It was also agreed that the vendees would not give up possession if the vendor paid half the price only and that the vendor would not be entitled to any interest on the half share paid nor would be entitled to claim a reduction in the profits of the vendees. The learned Judge of the Court below has held that the two documents are evidence of one transaction and we have no doubt that he is right upon this point. As we have already said, the two documents were executed on the same date and there was a reference to the agreement in the deed of sale. This was then a transaction by which the transferor transferred the property on condition that he would retransfer the property to the seller if the price of the property was repaid to him within a certain time. If we were to rely upon the terms of S. 58 (c), T. P. Act, alone, there could be no doubt that this was a mortgage by conditional sale. Learned counsel for the appellants has produced considerable authority in support of his argument that we are not to look to that subsection alone, but to the intention of the parties. There can be no doubt that it was at one time the law that the intention of the parties was to be the criterion. We may refer to the cases in 12 ALL. 387,<sup>1</sup> 22 ALL. 149<sup>2</sup> and 38 ALL. 570.<sup>3</sup> The question is whether the Transfer of Property Act made the law more definite and certain.

[3] There is no authority of their Lordships of the Privy Council upon this point, although in a subsequent case 47 Mad. 729<sup>4</sup> the decision depended upon intention. That, however, was a case where their Lordships were not called upon to decide whether it was necessary to base their decision upon intention. They decided that the transaction was a mortgage by conditional sale. There are decisions of various High Courts in favour of the appellants, but it may be doubtful



whether the question should not be reconsidered. In 33 ALL. 337<sup>5</sup> a Bench of this Court relied upon the English case in (1858) 2 De G. & J. 97<sup>6</sup> which was the basis of the decisions of their Lordships of the Privy Council to which we have referred, although the document with which they were dealing was executed in the year 1894. It does not seem to have been noticed that S. 58 (c), T. P. Act, might have affected the issue. In 45 ALL. 581<sup>7</sup> the learned Judges relied upon the cases in 12 ALL. 387,<sup>1</sup> 38 ALL. 570<sup>3</sup> and (1858) 2 De. G. & J. 97<sup>6</sup> although the document before them was executed in the year 1886. (1858) 2 De G. & J. 97<sup>6</sup> was a case in which emphasis was laid upon the principle that a document must be construed according to its terms, unless there are circumstances to prove that it is not what it appears to be. In 45 ALL. 581<sup>7</sup> the learned Judges asked themselves what the circumstances were which justified them in holding that the transaction with which they were dealing was not a sale which, on the face of it, it seemed to be. They also said that a mortgage by conditional sale must first be a mortgage. They mentioned the case in 42 Mad. 407.<sup>8</sup> In that case the question did arise whether the Transfer of Property Act had made any modification in the law. The learned Judges held that it had not. They relied upon a remark in 22 ALL. 149,<sup>2</sup> that the Transfer of Property Act had not changed the law. That remark certainly appears in the judgment but it is made in another context. Their Lordships mentioned that the question had been raised before them whether it was necessary to look to the intention of the parties and they specifically refused to decide it. They were dealing with a document executed in the year 1883. The other basis of the decision in 42 Mad. 407<sup>8</sup> is that the Transfer of Property Act by S. 58 (c) did not change the law because the terms "mortgagor" and "mortgaged property" are used in that sub-section and the use of these terms shows that it is necessary to look elsewhere to discover whether the transaction is a "mortgage" or not. In a sense this, of course, is so as was pointed out by a learned Judge of this Court in A. I. R. 1929 ALL. 174.<sup>9</sup> Sub-section (c) of S. 58 does not give a complete definition of a "mortgage." It is necessary to look to sub-s. (a) of this section to discover that a "mortgage" is the transfer of an interest in specific immovable property for the purposes of securing the payment of money advanced or to be advanced by way of loan or any existing or future debt. This does not take us very much further because the questions remain, what is a "loan" or a "debt"? We are inclined to think that a loan or a debt is a sum of money which the parties intend to be repaid and it is at least arguable that any condition

for re-transfer on payment of a sum of money necessarily implies that there is an intention that the money may be re-paid. It seems that the terms "debt" or 'loan' in S. 58 do not necessarily imply that the money advanced can be recovered by the creditor in a Court of law, because, otherwise, a usufructuary mortgage would not be a mortgage at all. It is certainly one of the incidents of a mortgage that the mortgage money can be recovered if the security is destroyed, but we doubt whether this contingency would ever be present in the minds of the parties in ordinary circumstances. On the whole we are somewhat doubtful whether S. 58, T. P. Act, has not, in some measure, modified the previous law, but we express no definite opinion because we find it unnecessary to do so and because we have not heard counsel on the other side. There are certainly some decisions in favour of the view that the condition for re-transfer would necessarily convert a sale into a mortgage provided that the agreement and the sale were parts of the same transaction.

[4] The reason why we do not think it necessary to express any definite opinion upon this point of law is that we are satisfied on the construction of the document before us that the learned Judge of the Court below was right in holding that there was an intention to mortgage rather than to sell. As the learned Judge has pointed out, the term given is eleven years, which, we think, suggests that the transferors were giving themselves as long as possible to repay the money. Then the learned Judge has come to the conclusion that the property was worth more than the sum of Rs. 6000, in consideration of which it was transferred. This finding has been contested before us. It is true that the price might be a fair one if the profit from rents alone was taken into consideration, but the learned Judge has pointed out that there must have been considerable miscellaneous profits accruing from forest land and grazing land. Learned counsel has drawn our attention to oral evidence suggesting that the miscellaneous profits were not large. There may be some force in what he says, but on the other hand we notice that Prag Dutt and one of his witnesses said that the property had decreased by a third in value and still Prag Dutt said that he was not willing to transfer it now for a sum of Rs. 8000. As it was not an ancestral property it is unlikely that any sentimental interest was attached to it and the attitude of the witness rather suggests that Rs. 6000 was not the full value in 1915. The learned Judge also relied upon the evidence of two witnesses, who appeared before him, Raj Narain, a teacher, and Durga Shanker Maewall, the director of a company. The learned Judge believed



them. They said that they were present when the transaction was being discussed; that the transferors wanted a sum of Rs. 12,000, for their property which the transferees were not able to supply and that it was suggested that the property might be transferred for the smaller sum of Rs. 6000, in the form of a mortgage. This evidence would not be admissible to prove what the transaction was, but it seems to us that it is admissible to prove the probable value of the property. The term in the agreement that the money might be repaid in two instalments and that the payment of one half would not give a right to any interest or reduction of profits also seems to us to be inconsistent with the idea that the property was to be sold outright. On the whole we are satisfied that there is no reason for disturbing the decision of the learned Judge of the Court below. We, therefore, dismiss the appeal with costs.

[5] We have before us a connected appeal, No. 381 of 1942 arising out of the same proceedings under the Encumbered Estates Act. The question is whether certain houses were transferred by Hori Lal to one Mt. Sunder Kunwar on 4-2-1915. The applicants under S. 4, Encumbered Estates Act, entered houses Nos. 1/181 and 1/182 as items 5 and 8 of their list of property. The appellants claimed these houses as theirs under the deed of sale to which we have referred. In that deed the property transferred was half of one house and the whole of another house, the latter being to the south of the former. The question is whether these are identical with houses Nos. 1/181 and 1/182 which are items 5 and 8 in the application. The learned Judge has come to a conclusion against the appellants on the evidence produced before him and learned counsel has not been able to satisfy us that that conclusion was wrong. Unfortunately there are no plans or maps upon the record. It is, therefore, difficult from the boundaries alone to come to a definite conclusion. The objectors had to prove their case and, in our judgment, they failed to do so. We see no reason to interfere with the decision of the learned Judge of the Court below and we dismiss this appeal also with costs.

D.S.

*Appeals dismissed.***A. I. R. (34) 1947 Allahabad 337 [C. N. 129.]****MALIK AND WALI ULLAH JJ.**

*Ratan Lal Gattani — Defendant—Applicant v. Harcharan Lal—Plaintiff — Opposite Party.*

Civil Revn. No. 72 of 1945, Decided on 3.5.1946, against order of Dist. Judge, Jhansi, D/- 2-12-1944.

Civil P. C. (1908), S. 20 (c)—A, resident of Jhansi in U. P., sending letter on 13-8-42 to B, resident of Katni in C. P., asking about rate of lime, etc.,

—B by his letter dated 22-8-42 supplying information but saying further that if A wished to buy lime advance would be necessary — B's letter not mentioning quality or quantity of lime or amount of advance—A by his letter dated 26-8-42 saying that he wanted 40 tons of white lime, quality No. 1 at Rs. 20 per ton—Lime not supplied—Suit by A against B in Jhansi Court for breach of contract — Held B's letter dated 22-8-42 amounted only to invitation to offer and not offer—A's letter dated 26-8-42 was offer and not acceptance of offer—Though offer was part of cause of action posting of letter dated 26-8-42 at Jhansi was no part of cause of action—Jhansi Court had no jurisdiction to hear suit—Contract Act (1872), S. 4.

A, a resident of Jhansi in U. P., sent a letter to B, a resident of Katni in C. P., on 13-8-1942 asking for information about the rate of lime and whether it was possible to have lime sent from Katni to Jhansi by railway. B wrote a letter on 22-8-1942 in which he gave the information wanted by A. He went on to say that in case A wished to buy lime from B it would be necessary for A to make an advance. No quantity of lime was mentioned nor was the quality mentioned barring this much that it was *Chuna rodi*. A in his letter dated 26-8-42 said that he wanted 40 tons of *rodi* No. 1 quality, white, at Rs. 20 per ton and was sending a bank draft for Rs. 200. The lime was not supplied and A filed a suit for breach of contract in the Court of Jhansi. The question was whether the Jhansi Court had jurisdiction to entertain the suit. It was contended for the plaintiff that the letter dated 22-8-1942 was an offer and his letter dated 26-8-1942 was an acceptance of the same. It was further contended that even if the letter dated 26-8-1942 was treated as an offer then the fact that the letter was posted at Jhansi would give the Jhansi Court jurisdiction as it must be said that a part of the cause of action arose in Jhansi :

*Held*, that with the quantity and quality of lime unspecified and with the amount of the advance not being made clear it was not possible to say that B's letter dated 22-8-1942 could be construed as an offer which A could accept by his letter dated 26-8-1942. It amounted merely to an invitation to offer. A's letter dated 26-8-1942 on the other hand, did constitute an offer. Though an offer is a part of the cause of action the mere fact that A posted the letter at Jhansi would be no part of his cause of action because there would be no proposal till it came to the knowledge of the person to whom the proposal was made. The Jhansi Court had, therefore, no jurisdiction to hear the suit : (1918) 1 K. B. 128 and 27 A. I. R. 1940 Mad. 49, *Rel. on* ; 18 A. I. R. 1931 Cal. 659, *Not foll.* [Paras 3, 5]

C. P. C. — ('44-Com.) S. 20, N. 17, Pts. 4 to 7.

*Cases referred :—*

1. ('22) 65 I. C. 282 : 9 A. I. R. 1922 Lah. 100, *Firm Durga Prasad Mutsaddi Lal v. Rulia Mal-Dooger Mal.*
2. (1873) 8 C. P. 107 : 42 L. J. C. P. 98 : 28 L. T. 32 : 21 W. R. 334, *Cooke v. Gill.*
3. (1888) 22 Q. B. D. 128 : 58 L. J. Q. B. 120 : 60 L. T. 250 : 37 W. R. 131, *Read v. Brown.*
4. (1855) 15 C. B. 501 : 24 L. J. C. P. 83 : 3 W. R. 203, *Borthwick v. Walton.*
5. (1873) 8 Exch. 208 : 42 L. J. Ex. 151 : 21 W. R. 850, *Green v. Beach.*
6. (1918) 1 K. B. 128 : 87 L. J. K. B. 189 : 118 L. T. 253, *Clarke Brothers v. Knowles.*
7. ('40) I. L. R. (1940) Mad. 195 : 27 A. I. R. 1940 Mad. 49 : 190 I. C. 154, *Ahmad Bux v. Fazl Karim.*
8. ('31) 58 Cal. 539 : 18 A. I. R. 1931 Cal. 659 : 134 I. C. 65, *Engineering Supplies Ltd. v. Dhandhanian & Co.*

*S. N. Verma — for Applicant.*

*R. B. Jaini — for Opposite Party.*



**Malik J.** — The only point in this case is whether the Jhansi Court had jurisdiction to hear the suit out of which this revision has arisen. The plaintiff is a resident of Jhansi and carries on business there. The defendant lives in Katni (C. P.) and carries on lime business in C. P. The plaintiff sent a letter to the defendant on 13-8-1942, asking for information about the rate of lime and whether it was possible to have lime sent from Katni to Jhansi by railway. The defendant wrote a letter on 22nd August, the material portions of which have been quoted in the judgments of the Courts below, in which he gave the information wanted by the plaintiff. He went on to say that in case the plaintiff wished to buy lime from the defendant it would be necessary for the plaintiff to make an advance. No quantity of lime was mentioned in this letter dated 22nd August nor was the quality mentioned in it barring this much that it was *chuna rodi*. The plaintiff in his letter dated 26th August said that he wanted 40 tons of *rodi* No. 1 quality, white, and was sending a bank draft for Rs. 200. The lime was, however, not supplied and the plaintiff filed this suit for breach of contract in the Court at Jhansi. The defendant's contention is that by a letter dated 28th August, he showed his willingness to supply the lime if railway trucks were available and if the plaintiff sent the gunny bags for the lime, as he had offered to send in his letter of 26th August. The plaintiff did not send the gunny bags nor were railway trucks available and he was, therefore, not able to complete the contract.

[2] The lower appellate Court has disbelieved the defendant's case that he ever sent the letter dated 28-8-1942. We cannot, sitting in revision, set aside that finding of the learned Judge. We shall, therefore, proceed on the basis that there are only three letters, the first dated 13th August, written by the plaintiff to the defendant, the second dated 22nd August written by the defendant to the plaintiff, and the last dated 26th August written by the plaintiff to the defendant. In the plaint it was alleged that it was on 26th August that the plaintiff made the offer to buy 40 tons of lime white, quality No. 1 at Rs. 20 per ton. At the time of the hearing of the case in the trial Court and the lower appellate Court it was argued on behalf of the plaintiff that it was a mistake and the offer was really dated 22nd August and that the plaintiff's letter of 26th August was an acceptance of the same.

[3] The trial Court held that the letter of the 22nd August could not be an offer or proposal as defined by the Contract Act. The defendant was sending a repl to the various queries of the plaintiff and intimating to him his mode of business that he needed an advance before he

undertook to supply the lime. The trial Court rightly pointed out that it could not be said that the defendant had by his letter of 22nd August, bound himself to supply any quantity that the plaintiff might demand. It would be noticed from the quotations of that letter given in the judgments of the Courts below that no quantity whatsoever was mentioned in that letter, neither was the amount of advance mentioned therein. The trial Court further pointed out that there was nothing in the letter dated 22nd August as regards the lime being white or of No. 1 quality, while the plaintiff in his letter of 26th August clearly intimated that he was willing to pay Rs. 20 per ton for white lime, quality No. 1. On all those considerations and relying on a case of the Lahore High Court in 65 I C 282<sup>1</sup> the trial Court held that the letter dated 22nd August amounted merely to an invitation to offer and did not constitute an offer. We are in full agreement with the reasonings given by the trial Court. The lower appellate Court, to our mind, misconstrued the letter of 22nd August and erred in holding that it was a definite proposal. With the quantity and quality of the lime unspecified and with the amount of the advance not being made clear it is impossible to say that the letter of 22nd August could be construed as an offer which the plaintiff could accept by the letter of 26th August. We, are, therefore, in full agreement with the decision of the trial Court that the letter of the plaintiff dated 26-8-1942 did constitute an offer.

[4] The lower appellate Court has held in the alternative that if the letter of 26th August was an offer or a proposal—the term that is used in the Contract Act—then the fact that the letter was posted at Jhansi would give the Jhansi Court jurisdiction to try the suit as it must be held that a part of the cause of action arose in Jhansi. Under S. 20 (c), Civil P. C., which is the only provision relied on, on behalf of the plaintiff, every suit shall be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. The term 'cause of action' has been defined in (1873) 8 C. P. 107<sup>2</sup> as :

"every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence"

which is necessary to prove each fact, but every fact which is necessary to be proved. (See also (1888) 22 Q. B. D. 128<sup>3</sup> at p. 131.) That an offer is a part of the cause of action was held in (1855) 15 C. B. 501<sup>4</sup> and (1873) 8 Exch. 208.<sup>5</sup>

[5] Under S. 4, Contract Act, the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made,



while the communication of an acceptance is complete, as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor, and as against the acceptor, when it comes to the knowledge of the proposer. The mere fact that the plaintiff posted a letter at Jhansi would be no part of his cause of action because there will be no proposal till it came to the knowledge of the person to whom the proposal was made. Learned counsel for the applicant has given a very apt illustration that if a person while travelling in a train gets down at a railway station to post a letter making an offer, it could not be said that the place where the letter was posted had anything to do with any part of the cause of action. The point is fully covered by a decision of the Madras High Court and certain decisions of the English Courts.

[6] In (1918) 1 K. B. 128<sup>6</sup> it was held that "where a contract is made by offer and acceptance sent through the post between parties residing in different county Court districts the posting of the offer is not part of the cause of action within the meaning of that section."

The section mentioned was s. 74, County Courts Act, 1888, the relevant portion of which was as follows:

"every action or matter . . . may be commenced by leave of the Judge or registrar . . . in the Court in the district of which the cause of action or claim wholly or in part arose."

The language is very similar to the language of s. 20, cl. (c), Civil P. C. Lawrence J. in the course of his judgment mentioned that the plaintiffs in a case under s. 74, County Courts Act, 1888, had to establish that a part of the cause of action arose within the district as a condition of obtaining leave from the registrar to commence the action in that Court. Dealing with the question whether it could be said that a part of the cause of action arose at a place where the offer was posted, he observed:

"I agree that the posting of the offer was no part of the cause of action. The making of an offer is part of the cause of action, but an offer is made where it is received, and that in this case was at Croydon."

Lush J. (who later became Lush L. J.) held:

"The material question is not where the offer was sent from but where it was made, and the making of the offer is proved by showing that it was received. Therefore the offer here was made in Croydon. The posting of it was no part of the cause of action."

This case was followed by the learned Sir Lionel Leach, C. J., and Kunhi Raman J. in I. L. R. (1940) Mad. 195.<sup>7</sup> In that case the plaintiff sent a telegram from Madras to a man at Hyderabad offering to buy hide at a certain price. The offer was accepted and the question was whether any part of the cause of action arose at Madras simply because the telegram was sent from Madras. After a careful review

of the various decisions of the Madras High Court and other Courts the learned Chief Justice observed as follows:

"The proposal for the policy was posted from Madras and it was contended that the contract must therefore be deemed to have been made here . . . I am unable to agree that the posting of an offer or the despatch by telegram of an offer from a particular place can be regarded as part of the cause of action. The making of the offer has to be proved in order to entitle a plaintiff to succeed in such a case as this, but the offer is made at the place where it is received and if it is made by post or telegram the place of despatch is not a material factor."

[7] Section 4, Contract Act, puts it beyond any controversy that an offer must be deemed to have been made at the place where it was received and not at the place from where it was sent.

[8] Learned counsel for the respondent has placed strong reliance on a decision of the Calcutta High Court in 58 Cal. 539.<sup>8</sup> The decision was by Rankin C. J. and Ghose J. Any observation on a point of Law by Rankin C. J. is entitled to great weight. In that case an offer was made by a cablegram to London from Calcutta and it was accepted by cablegram from London. In accordance with the terms of the contract the goods were sent to Calcutta, but they were rejected because they were said not to be of the specified quality. The learned Chief Justice regarded the making of the offer by cablegram from Calcutta as part of the cause of action and the rejection of the goods in Calcutta as also a part of the cause of action. As was pointed out by Leach C. J. in I. L. R. (1940) Mad. 195,<sup>7</sup> referred to above, the contract was a c. i. f. contract inasmuch as the goods had to be delivered in Calcutta and therefore there could be no doubt that a part of the cause of action did arise in Calcutta. The observations of the learned Chief Justice were, therefore, not necessary for the decision of that case and the case having been decided on both points in favour of the plaintiff the decision on the point may be treated as unnecessary. In any case, after having carefully considered the law on the point, we are inclined to agree with the view of the Madras High Court that the posting of an offer cannot be considered to give rise to a part of the cause of action at a place where the offer is posted when the person to whom the offer is to be communicated lives at a different place.

[9] For the reasons given above, we allow this application in revision, set aside the order of the lower appellate Court and restore that of the Court of first instance. The applicant is entitled to his costs.

D.H.

*Revision allowed.*



A. I. R. (34) 1947 Allahabad 340 [C. N. 130.]

WALIULLAH J.

*Hafiz Mohammad Ishaq and others — Plaintiffs—Applicants v. Chief Inspector of Stamps U. P. and others — Defendants — Opposite Party.*

Civil Revn. No. 327 of 1945, Decided on 7-11-1946, against order of Dist. Judge, Benares, D/- 19-2-1945.

(a) Civil P. C. (1908), S. 115 — 'Case decided' — Revision against order as to court-fee — Order under S. 6B (U. P.) of Court-fees Act partly allowing revision is 'Case decided' and revisable — Court-fees Act (1870), S. 12.

An order passed in revision under S. 6B (U. P.), Court-fees Act, partly allowing the revision and to that extent calling upon the plaintiff to make good the deficiency in the amount of court-fee paid by him on the plaint, is a "case decided" within the meaning of S. 115, Civil P. C., and the order is revisable. This right to file an application in revision remains unaffected by the fact that S. 6B (U. P.) excludes the right of an appeal against the order : *Case law referred.* [Para 4]

('44-Com) Court-fees Act, S. 12, N. 13.

(b) Court-fees Act (1870) (as amended in U. P.), S. 6B — Decision by Munsif as to court-fee in favour of plaintiff before objection raised by officer — Munsif subsequently dismissing officer's objection holding that his view as to court-fee was correct — *Held*, that the order passed by Munsif was one under S. 6 (3) and revision by officer was competent.

Where the Munsif had already decided the question of deficiency in court-fee on the plaint in favour of the plaintiff before the Chief Inspector of Stamps raised the question of deficiency and subsequently dismissed the objection of the Chief Stamp Inspector holding in effect that the view taken by him in the order passed as to court-fee was correct :

*Held*, that in substance though not in form the order of the Munsif passed on the objection of the Inspector was an order passed under S. 6 (3) on the question of deficiency raised by the Inspector and as this order was at variance with opinion of the officer, the revision on behalf of the officer was competent under S. 6B.

[Para 5]

('44-Com) Court-fees Act, Note U. P. Ss. 6A-6C.

(c) Court-fees Act (1870) (as amended in U. P.) S. 7 (iv-A) (2) — "Suit involving cancellation. . . ." meaning of — Decree for specific performance of contract of sale in favour of A against B — C suing for permanent injunction restraining A from getting sale-deed executed in his own favour in virtue of the decree — S. 7 (iv-A) (2) assumed to apply — Court-fee held payable on one-fifth the value of the suit for specific performance.

A filed against B as the sole defendant a suit for specific performance of an agreement for sale of a house. The suit was valued at Rs. 5000 for court-fee purposes. The suit was decreed. C instituted a suit against A, one of the reliefs claimed being that A be permanently restrained from getting the sale-deed effected in his favour in virtue of the decree for specific performance. It was assumed that S. 7 (iv-A) (2) applied to the case :

*Held*, that C must pay court-fee on one-fifth of the total value of the subject-matter of A's suit, that is, on Rs. 1000. [Para 6]

('44-Com) Court-fees Act, S. 7 (iv) (c) N. 26 (d), S. 7 (iv-A) U. P.

(d) Civil P. C. (1908), O. 6, R. 17 — Revisionist Amendment sought pending before Court of first instance—Case coming before High Court in revision in some other connection — Amendment cannot be effected in revision.

An application for amendment of the relief claimed in the plaint was pending before the Court of first instance and had not received its attention. The case came before the High Court in revision in connection with court-fee question :

*Held*, that the amendment could not be effected in revision. [Para 7]

('44-Com) Civil P. C., O. 6, R. 17, N. 13.

*Cases referred :*

1. ('34) 1934 A. L. J. 381 : 21 A. I. R. 1934 All. 620 : 57 All. 17 : 149 I. C. 1183 (F. B.), Gupta & Co. v. Kirpa Ram Brothers.
2. ('41) 1941 A. L. J. 376 : 28 A. I. R. 1941 All. 298 : I L R (1941) All. 558 : 195 I. C. 758, Mohri Kunwar v. Kesri Chandra.
3. ('38) 25 A. I. R. 1938 Pat. 22 : 16 Pat. 766 : 172 I C 840 (F. B.), Ramkhelawan Sahu v. Surendra Sahi.
4. ('42) 29 A. I. R. 1942 Pat. 60 : 20 Pat. 780 : 198 I. C. 866, Ramautar Sao v. Ramgobind Sao.
5. ('42) 29 A. I. R. 1942 Mad. 585 : 203 I. C. 457, Ratnavelu Pillai v. Varadaraja.

*Mushtaq Ahmed* — for Applicants.

*Brijlal Gupta* — for Opposite Party.

**Order.** — This is an application in revision under S. 115, Civil P. C., on behalf of the plaintiffs. It is directed against the order of the learned District Judge passed in revision regarding the matter of the court-fee which arose in the Court of the first instance. The relevant facts and circumstances may be briefly set out here.

[2] On 7-7-1934 an agreement was entered into between one Haji Taj Mohammad and Tara Mohan Day, who is defendant 1 in the present suit, for the sale of one of the two houses and a room of another house belonging to Haji Taj Mohammad. The sale price agreed between the parties was fixed at Rs. 5000. It appears that on 13-10-1934, Tara Mohan Day filed Suit No. 91 of 1934, for specific performance of the agreement for sale dated 7-7-1934. He impleaded Haji Taj Mohammad as the sole defendant. The suit was valued at Rs. 5000. While this suit was pending, it appears that on 30-1-1935, the four sons of Haji Taj Mohammad filed another suit, suit No. 11 of 1935 against Tara Mohan Day and Taj Mohammad. They sought a declaration that 4/5th share in the two houses mentioned in the agreement for sale dated 7-7-1934, belonged to them and this suit was valued at about Rs. 9000. On 23-9-1935, one of the four sons of Taj Mohammad, namely, Abdul Rahim, died and thereupon his sons were brought upon the record as his legal representatives. Finally on 21-3-1936, the learned Civil Judge decreed Suit No. 91 of 1934 in favour of Tara Mohan Day and dismissed suit No. 11 of 1935 instituted by the sons of Haji Taj Mohammad. It appears that appeals filed against



these decrees were unsuccessful and both these decrees became final. Thereafter, on 15-1-1934, Suit No. 13 of 1944 was instituted by three of the sons of Abdul Rahim, in substance for the following reliefs: (a) A declaration may be made that the plaintiffs are owners in possession of 3/25ths share in the two houses mentioned in Sch. B of the plaint. This was to be on the footing that the decree passed in Suit No. 11 of 1935 against the four sons of Haji Taj Mohammad dated 21-3-1936 was null and void against the plaintiffs. This relief was valued at Rs. 1278-15-4. (b) Tara Mohan Day, defendant 1, be permanently restrained from getting the sale-deed effected in his favour in virtue of the decree for specific performance obtained by him in Suit No. 91 of 1934. This relief was valued at Rs. 50.

[3] The defendants contested the suit on various grounds including the question with regard to the insufficiency of the court-fee paid. Issue No. 5 was framed by the learned Munsif with regard to the defendants' objection regarding the court-fee paid by the plaintiffs. The learned Munsif, on 14-4-1944, decided issue No. 5 of the suit in favour of the plaintiffs and held that the court-fee paid was sufficient. On 13-5-1944, however, the Chief Inspector of Stamps submitted a report to the effect that there was a deficiency in court-fee paid to the extent of Rs. 637-8-0. On 10-7-1944 the learned Munsif finally decided the objection raised by the Chief Inspector of Stamps. In effect he held that the view taken by him in the order passed on 14-4-1944 was correct and in this view of the matter he dismissed the objections raised by the Chief Inspector of Stamps. Against this order the Chief Inspector of Stamps went up in revision to the learned District Judge under S. 6-B, Amended Court-fees Act. The learned District Judge partly allowed the application in revision and modified the order passed by the learned Munsif. Against the order passed by the learned District Judge the plaintiffs have come up in revision to this Court. A preliminary objection has been raised by the opposite parties to the effect that no revision lies against the order of the learned District Judge inasmuch as there is no '*case decided*' so far by the Court below. Learned counsel have referred to the Full Bench decision of this Court in 1934 A. L. J. 381<sup>1</sup> where it was held:

"A mere decision as to the amount of the court-fee payable does not amount to a '*case decided*' nor is it necessarily an irregularity in procedure or illegality or refusal to exercise jurisdiction. No revision, therefore, lies to the High Court from an order of the Court below calling upon the plaintiffs to make good the deficiency in the amount of court-fee paid by him."

[4] Learned counsel for the applicants has strongly contended that after the decision by

the Full Bench in the year 1934, the Court-fees Act has itself undergone substantial changes by reason of the amending Acts passed in the years 1936 to 1938. It is contended that by reason of the recent amendments the situation of an application in revision like the present one is completely altered. Under S. 6-A, Court-fees Act, as amended, it is provided that a plaintiff when called upon to make good a deficiency in court-fee may appeal against such order as if it were an order appealable under S. 104, Civil P. C. Similarly, it is provided by S. 6-B that if the order of the Court with regard to the objection raised by the Chief Inspector of Stamps be at variance with the opinion of the officer he may, within three months from the date of receipt of such order, file an application in revision in the Court to which the appeal lies from a decree in the suit in which such order has been passed. These provisions, so it is contended, have effected a fundamental change in the position, as it stood, at the time when the Full Bench decision was given. The learned counsel for the applicants has further invited my attention to a decision of two learned Judges of this Court in 1941 A. L. J. 376,<sup>2</sup> where at p. 381, the learned Judges have made this observation:

"We also think that so far as the question of court-fee is concerned '*the case has been decided*' within the meaning of S. 115, Civil P. C., but it is not necessary to express any final opinion upon these contentions."

This is of course not a final opinion and must be treated as an obiter dictum. Learned counsel has also referred to the case in A. I. R. 1938 Pat. 22<sup>3</sup> decided by a Full Bench of the Patna High Court. This ruling was followed by a Bench of two learned Judges of the Patna High Court in A. I. R. 1942 Pat. 60.<sup>4</sup> It is contended that the view taken by the Patna High Court in these two cases supports the contention of the learned counsel for the applicants. Reference has also been made to the case in A. I. R. 1942 Mad. 585,<sup>5</sup> where a learned single Judge of the Madras High Court appears to have adopted the same view. I need not however consider these authorities at any length here. In view of the amendments introduced into the Court-fees Act by S. 6-A and S. 6-B it seems to me, as at present advised, that the position is now fundamentally altered and what was not open even to a mere application in revision in 1934 has now become subject to a right of appeal by one party under S. 6-A and subject to a right of revision by the other party under S. 6-B. It seems to me, therefore, difficult to hold that the nature of the order sought to be challenged by means of this application is such that it should be held not to amount to a '*case decided*' within the meaning of S. 115, Civil P. C. Learned counsel for the



opposite parties have, in the course of their arguments, laid particular emphasis upon the expression "no appeal shall lie from such order" in S. 6-B. Obviously this expression excludes the right of an "appeal" against the order passed by the learned District Judge in the present case. It does not, however, in reality affect the right of revision. Similar expressions are to be found in some other acts passed by the U. P. Legislature and in spite of such provisions it has been held by this Court in several cases that the right of a party to make an application in revision to this Court under S. 115, Civil P. C., remains unaffected thereby. In view of the above I would overrule the preliminary objection.

[5] With regard to the merits of the application, learned counsel for the applicants has strongly contended in the first instance that the learned District Judge had no jurisdiction to entertain an application in revision filed on behalf of the Chief Inspector of Stamps. The contention of the learned counsel, in substance, is that inasmuch as the learned Munsif had already decided the question of deficiency in court-fee under sub-cl. 4 of S. 6, in deciding Issue 5, before the Chief Inspector of Stamps raised the question of the deficiency in court-fee by means of his report dated 13.5.1944, there could, in law, be no order passed by the learned Munsif such as is contemplated by sub-s. (3) of S. 6. The contention of the learned counsel is that it is only against an order passed under sub-s. (3) of S. 6, Court-fees Act, that the Chief Inspector of Stamps is given the remedy by means of an application in revision under S. 6-B. Learned counsel has further contended that the order of the learned Munsif dated 10.7.1944, did not purport to be an order under sub-s. (3) of S. 6 and, therefore, in any view of the matter it was not subject to a right of revision under S. 6-B. I have carefully listened to all that the learned counsel had to urge with reference to his ingenious arguments based upon the sequence of the two sub-ss. (3) and (4) and the phraseology used in S. 6 B, Court-fees Act. I have heard learned counsel for the opposite parties as well. It seems to me, however, that, in substance, though not in form the order of the learned Munsif passed on 10.7.1944, was an order passed on the question of deficiency raised by the Chief Inspector of Stamps and this order was undoubtedly at variance with the opinion of the officer who had raised the question of deficiency in court-fee. It follows, therefore, that the revision filed on behalf of the Chief Inspector of Stamps in the Court of the learned District Judge was fully competent and there was no defect in the jurisdiction of the learned Judge in entertaining the revision and disposing of it.

[6] I may mention, in passing that there is no dispute now with regard to the amount of court-fee paid regarding relief 'A' of the plaint. Both the Courts below have held that the court-fee paid is sufficient regarding that relief and there is no application in revision challenging that order of the learned Judge before me. The only question which I have to consider and decide is whether the amount of court-fee paid regarding relief 'B' of the plaint is or is not in accordance with law. Relief 'B' as it stands is, to my mind, rather vague. It is couched in a language which could be easily interpreted to refer to the whole of the property comprised in Suit No. 91 of 1934, that is, the suit for specific performance filed by Tara Mohan Day against Taj Mohammad. That suit related to one complete house and also a room of the other house. The valuation of both these items of property was fixed by Tara Mohan Day, the plaintiff, at Rs. 5000. Under sub-s. (2) of S. 7 (IV-A) the plaintiffs would, therefore, have to pay the court-fee calculated according to 1/5th of the value of one complete house and one room of the other house. The learned District Judge has also held that this provision of the Court-fees Act is applicable to the facts of the present case. The question, however, remains as to the value of the subject-matter of the claim referred to in relief B. With regard to this matter, however, it seems to me that the learned Judge has confused the property involved in Suit No. 11 of 1935, with the property involved in Suit No. 91 of 1934. As mentioned above already, Suit No. 91 of 1934, related only to one of the two houses plus one room in the other house; whereas, in Suit No. 11 of 1935, a 4/5th share in both the houses was involved. In view of the phraseology in which relief B is couched at present it is obvious that the plaintiffs must pay court-fee on one fifth of the total value of the subject-matter of Suit No. 91 of 1934, that is, on Rs. 1000.

[7] Learned counsel for the applicants has invited my attention to the application filed by the plaintiffs on 12.3.1945, after the decision of the revision by the learned District Judge on 19.2.1945. In this application the plaintiffs endeavoured to explain what they actually meant by the language employed in drafting relief B of the plaint. In the end it was specifically prayed that certain amendments of relief B might be allowed at that stage and thereafter calculation of court-fee be made. This application does not appear to have been disposed of by the Court of the first instance till now. It appears that certain pleas were taken by the plaintiffs themselves for seeking adjournment of the proceedings in the Court of the learned Munsif and thus the Court has not, as yet,



passed any order with regard to the amendments sought by means of this application. The learned counsel at one stage endeavoured to persuade me to allow him here to effect the amendments in relief B as it stands at present, but this request obviously could not be entertained inasmuch as the matter has not yet received the attention of the Court of first instance. Learned counsel has, in this connection, referred me to the case in 1941 A. L. J. 376,<sup>2</sup> in which, in somewhat similar circumstances, a Bench of two learned Judges of this Court held that a suitor had a right to amend his plaint in any manner he likes and so far as his amendments prayed for are not contrary to law or are likely to lead to injustice they should be granted. There is no doubt that the learned Munsif will consider this application and while so doing will bear in mind the observations of the learned Judges of this Court in the abovementioned case. If and when he allows the amendments sought to be effected, no doubt the requisite court-fee will have to be calculated in the light of the amendments effected. In case of the amendments being allowed the basis of the calculation would obviously be 1/5th of 3/25th of 5,000.

[8] I accordingly allow this application in part to the extent indicated above. I make no order as to costs of this Court.

V.B.B. *Application allowed in part.*

**A. I. R. (34) 1947 Allahabad 343 [C. N. 131.]**  
MOOTHAM J.

*Chander Bhan Singh — Applicant v. Lallu Singh and another — Opposite Party.*

Civil Revn. No. 393 of 1945, Decided on 18-9-1946, from order of Civil Judge, Farrukhabad, D/- 10-2-1945.

(a) Civil P. C. (1908), O. 11, R. 21 — Order under, when can be passed — Civil P. C. (1908), O. 11, Rr. 11, 1.

In the absence of an order under O. 11, R. 11 requiring the plaintiff to answer interrogatories the Court has no power under O. 11, R. 21 to dismiss his suit if the interrogatories were not answered: 13 A. I. R. 1926 All. 553, *Rel. on.* [Paras 4, 5]

An order granting leave under O. 11, R. 1 to deliver interrogatories does not amount to an order to answer interrogatories under O. 11, R. 11: 18 Cal. 420, *Rel. on.* [Para 5]

C. P. C.— ('44-Com.) O. 11 R. 21 N. 1 Pt. 1; O. 11 R. 1 N. 12 Pt. 2.

(b) Civil P. C. (1908), S. 151 — Order under O. 11, R. 21 — Setting aside of—Civil P. C. (1908), O. 11, R. 21.

An order under S. 151 cannot be made where there is a specific remedy provided by the Code applicable to the circumstances of the case. Order 43, R. 1, gives a party a right to appeal from an order passed under O. 11, R. 21, and if he fails to avail himself of that remedy the order under O. 11, R. 21 cannot be set aside under S. 151: 20 A. I. R. 1933 All. 382, *Rel. on.* [Para 5]

C. P. C.— ('44-Com.) S. 151 N. 4 Pts. 1, 22.

(c) Civil P. C. (1908), O. 32, R. 5 (1) and (2)—Application by minor plaintiff himself in contravention of O. 32, R. 5 (1)—Order on—Validity.

Where an order is made on an application filed by the minor plaintiff himself without being represented by his next friend in contravention of O. 32, R. 5 (1) the Court has a discretion under O. 32, R. 5 (2) to discharge the order or not and is not bound to set aside such order if it is satisfied that the order was for the benefit of the minor: 26 A. I. R. 1939 Sind 332, *Approved.* [Para 6]

C. P. C.— ('44-Com.) O. 32 R. 5 N. 2 Pt. 2.

(d) Civil P. C. (1908), S. 115 — Illegal order — Interference with.

Where the trial Court by an illegal order dismisses the plaintiff's suit and by another illegal order sets aside the first illegal order and thus restores the parties to their original position the High Court in the exercise of its discretionary powers will not set aside the second only of the illegal orders as it would have the effect of restoring the first illegal order: 18 A. I. R. 1931 Cal. 425 and 12 A. I. R. 1925 Pat. 36, *Rel. on.*; 14 A. I. R. 1927 Cal. 158 and 26 Mad 176, *Expl.* [Paras 8, 9]

('44 Com.) Civil P. C. S. 115, N. 16, pts. 5, 6.

*Cases referred :—*

1. ('26) 24 A. L. J. 589 : 13 A. I. R. 1926 All. 553 : 96 I. C. 16, Ramapat Saran v. Habib Ullah Khan.
2. ('91) 18 Cal. 420, Prem Sukh Chunder v. Indro Nath Banerjee.
3. ('33) 55 All. 548 : 20 A. I. R. 1933 All. 382 : 144 I. C. 731, Nageshar Prasad v. Gudrilal Narain Das.
4. ('39) 26 A. I. R. 1939 Sind 332 : 185 I. C. 155, Lalumal Dholumal v. Harumal Lalsingh.
5. ('27) 14 A. I. R. 1927 Cal. 158; 98 I. C. 70, Asutosh Ghosh v. Indu Bhusan.
6. ('03) 26 Mad. 176, Ramasamy Chettiar v. R. G. Orr.
7. ('31) 35 C. W. N. 31; 18 A. I. R. 1931 Cal. 425 : 131 I. C. 561, Kuti Baru Bibi v. Jitendra Nath.
8. ('24) 3 Pat. 778; 12 A. I. R. 1925 Pat. 36 : 84 I. C. 320, Rameshwar Mahton v. Lala Dwarka Prasad.

*Baleshwari Prasad*—for Applicant.

*Shambhu Prasad*—for Opposite Party.

**Order.**—This is an application under S. 115 Civil P. C., for the revision of an order of the Civil Judge of Farrukhabad dated 10-2-1945. The circumstances giving rise to this application are as follows: In the year 1944, Lalla Singh filed a suit in the Court of the Civil Judge of Farrukhabad, and on 10th July of that year the Court gave leave to the defendants, the applicants before me, to deliver certain interrogatories to the plaintiff and directed the latter to file his answers thereto by 26th July. On that date, no answers having been filed and the plaintiff not appearing, the Court on the application of the defendants dismissed the suit, purporting to act under O. 11, R. 21, Civil P. C.

[2] On 25-8-1944, the plaintiff applied to the learned Judge for the restoration of the suit on the ground that on the date on which answers to the interrogatories should have been filed both he and his guardian (the plaintiff being a minor) were seriously ill. The learned Judge was satisfied that, for the reasons given by the plaintiff, answers to the interrogatories could not be filed



by the date fixed; and he was further of opinion that his order dismissing the suit was one which in any case he should not have made as he had overlooked the fact that as no order had been made under O. 11, R. 11, directing the plaintiff to answer the interrogatories, he had no power under R. 21 of that Order to dismiss the suit if the interrogatories were not answered. In these circumstances he was of opinion that the proper course was for him to exercise his inherent powers under S. 151 of the Code, and accordingly he, on 10.2.1945, allowed the application and directed the restoration of the suit.

[3] This order is now attacked on two grounds. It is said, first, that the order of the learned Judge of 26th July dismissing the suit was a valid order and, if it were not, the Court had no inherent power under S. 151 to set it aside as the order was one which was appealable under O. 43, R. 1 (f); secondly, it is said that the order of the Court dated 10.2.1945 is a nullity inasmuch as it was made on an invalid application—the application being invalid because it was filed not by the plaintiff's guardian but by the plaintiff himself, who was admittedly a minor.

[4] It is, in my opinion, clear that the order of the learned Civil Judge of 10.7.1944, dismissing the plaintiff's suit, was wrong in law. In 24 A. L. J. 589<sup>1</sup> it was pointed out that:

"An order under that rule (that is to say O. 11, R. 21) can be passed only, when there is a previous order under R. 11, requiring a party to answer interrogatories. There are two stages in which the application proceeds. The first is indicated in R. 1. Under that Rule a party simply delivers certain interrogatories to be answered by the other party. The other party may or may not comply with the request. When the party to be questioned fails to answer the interrogatories, the party interrogating has a right to come before the Court and to obtain an order under R. 11 for an answer. It is then that the Court decides whether the party 'interrogated must answer or not . . . It is when the Court has ordered certain interrogatories to be answered and there is a failure that the question arises whether the failure should be punished and the order enforced by the provision of R. 21."

[5] It is clear that in this case no order was made by the Court under O. 11, R. 11, but it is said that the Court's original order of the 10th July, allowing interrogatories to be delivered and directing the plaintiff to answer them by the 26th July, amounted to an order within the meaning of R. 11. In my opinion this was not so, for on that date the Court did no more than make an order under R. 1, and there can be no doubt the granting of leave under that rule does not amount to an order to answer interrogatories under R. 11 : 18 Cal. 420.<sup>2</sup> It is, therefore, to my mind clear that the learned Civil Judge had no power on 25th July to dismiss the suit : but it is, in my judgment, equally clear that, having dismissed the suit, he had no authority

under S. 151 of the Code subsequently to direct its restoration, for it is well established that where a party has neglected to avail himself of a remedy provided by the Civil Procedure Code, it is not open to him to invite the Court by virtue of its inherent jurisdiction to disturb a decree or order which he has failed to challenge in a statutory manner : 55 ALL. 548.<sup>3</sup> A Court has jurisdiction to pass an order under S. 151, whenever it is necessary for the ends of justice or to prevent the abuse of a process of Court, but it cannot be said that the exercise of this power is necessary to meet the ends of justice or to prevent the abuse of a process of the Court where there is a specific remedy provided by the Code applicable to the circumstances of the case. Order 43, R. 1, gives a party a right to appeal from an order passed under O. 11, R. 21 and in my opinion, therefore, the learned Civil Judge in passing his order of 26th July 1944 acted illegally in the exercise of his jurisdiction.

[6] With regard to the question whether on 10.2.1945, the Court had before it a valid application it is clear that although O. 32, R. 5 (1), says that every application to the Court on behalf of a minor shall be made by his next friend or by his guardian for the suit, sub-rule (2) of that order provides that a Court may discharge an order which has been made on an application filed in contravention of the provisions of sub-rule (1). In my opinion the Court in such cases has a discretion in the matter and it is not bound to set aside such an order if it is satisfied that the order was for the benefit of the minor. This was the view taken in A. I. R. 1939 Sind 332,<sup>4</sup> with which I respectfully agree.

[7] The position is, therefore, that the learned Civil Judge acted illegally in dismissing the plaintiff's suit on 26th July and that he acted illegally in directing the restoration of the suit on 10.2.1945. I have no doubt that in passing his order of 10.2.1945, the learned Civil Judge firmly believed that he was taking the best step available to remedy the position created by his earlier erroneous order of 26th July, and that in so doing he was acting for the benefit of the minor plaintiff. In so far as the effect of the one illegal order has been to set aside another illegal order and thus to restore the parties to their original position, I should not be disposed in the exercise of my discretionary powers under S. 115 of the Code to set aside the second only of such illegal orders if this course can be avoided. It has however been urged upon me that, in view of the fact that the learned Civil Judge in passing his order of 26th July acted without jurisdiction or, as I consider, acted illegally in the exercise of his jurisdiction, I have no choice in the matter but must direct that the second of his orders



must be set aside. I have been referred to the cases in A. I. R. 1927 Cal. 158<sup>5</sup> and 26 Mad. 176.<sup>6</sup> The first of these cases was a civil revision in which Cuming and Page JJ. considered the extent of the inherent powers of a Judge under s. 151, Civil P. C., and being of opinion that in the circumstances of the case the Judge of the lower Court had improperly exercised his powers under that section they set his order aside. The learned Judges in this case do not, however, appear to have considered whether the order they made was one the making of which was subject to their discretion nor does it seem that they were invited to do so. In 26 Mad. 176,<sup>6</sup> the application for revision arose out of a suit for damages for breach of a covenant in an agreement which had been wrongly filed in a Court which had no jurisdiction to entertain it. Sir Arnold White C. J. held that the Court of first instance exercised a jurisdiction not vested in it by law, and although he did so with obvious reluctance, he considered that he was bound to interfere.

[8] On the other hand, Costello J. in 35 C.W.N. 31<sup>7</sup> declined to set aside an order of an appellate Court, made without jurisdiction, when the effect of so doing would have been to restore an order improperly made by the trial Court and in 3 Pat. 778<sup>8</sup> a Bench of the Patna High Court refused to set aside an order made by a Court, although such order was made without jurisdiction. In that case, an order had been made dismissing a suit on a preliminary point. It was open to the plaintiff to apply for review of that order under O. 47, R. 1, but instead of doing so he asked the trial Court for an order restoring the suit to be made in exercise of its inherent powers. The Bench held that in the circumstances the lower Court had no power to act under s. 151 of the Code, but as the plaintiff would undoubtedly have succeeded had he pursued the remedy allowed by law, namely review, it was not a fit case for interference.

[9] The exercise by the High Court of the powers vested in it by s. 115, Civil P. C., is by the terms of the section itself, discretionary, and accordingly I do not think that the law imposes any obligation on me to exercise those powers in this case. There is no reason to doubt that had the opposite party appealed under O. 43, R. 1, against the order dismissing his suit he would have obtained an order for its restoration; and, in my opinion, this is a fit case in which my discretion should be exercised in favour of the opposite party. The application is accordingly rejected, with costs.

G.N.

*Application rejected.***A. I. R. (34) 1947 Allahabad 345 [C. N. 132.]****MALIK AND WALI ULLAH JJ.***Baldeo Singh v. Kailash Singh.*

First Appeal No. 311 of 1943, Decided on 14-3-1946, from decree of Addl. Civil Judge, Ballia, D/- 1-3-1943.

(a) North Western Provinces Rent Act (18 [XVIII] of 1873), Para 7—No exproprietary rights in sir and khudkasht before 1873.

Exproprietary rights in sir and khudkasht were recognised for the first time by the Act of 1873. Before 1873 there was no provision that a landlord after the sale of his proprietary rights would be entitled to remain in possession of his sir and khudkasht land as an exproprietary tenant. Nor was there any provision for creating exproprietary tenancy by contract. [Paras 7 &amp; 8]

(b) Agra Pre-emption Act (11 [XI] of 1922), S. 9—'Exproprietary tenants' and 'exproprietary tenancy.'

The words 'exproprietary tenant' and 'exproprietary tenancy' are words of art and must be interpreted to have the same meaning in the Pre-emption Act as in the Rent Acts. The words cannot mean that an exproprietary tenant is a tenant who had at one time been a proprietor. [Para 10]

(c) Civil P. C. (1908), S. 35—False allegations.

Where a successful plaintiff in a pre-emption suit had come into Court on a false allegation with the intention of pre-empting the property for less than its two-thirds value, the parties should be directed to bear their own costs. [Para 13]

('44-Com.) C. P. C., S. 35 N. 7 Pt. 25.

*Sir Tej Bahadur Sapru and Shambhu Prasad*—for Appellants.*P. L. Banerji and Janki Prasad*—for Respondents.**Malik J.**—This is a defendant vendee's, appeal in a suit for pre-emption.

[2] The plaintiff, Kailash Singh, brought a suit for pre-emption of a sale dated 21st March 1940, by which the defendants second party sold certain fractional shares in seven villages situate in Taluqa Jamuan to the defendants first party. The plaintiff's allegations were that he was a cosharer in village Jamuan while the vendees were strangers. According to the plaintiff there was a custom of pre-emption entered in the *wajib-ul-arzs* and he was entitled to claim pre-emption on the basis thereof. The price entered in the sale deed was Rs. 1999 but the plaintiff alleged that the correct sale consideration was only Rs. 1275 and he offered to pre-empt the sale on payment of Rs. 1275 or of any amount which was deemed reasonable by the Court.

[3] The defence was a denial of the plaintiff's right to pre-empt on the ground that the plaintiff was not a cosharer and was not entitled to claim pre-emption. It was further alleged that the plaintiff had consented to the sale in favour of the defendants and was, therefore, estopped from claiming pre-emption of the property. It was also urged that the defendants were cosharers and were exproprietary tenants. Lastly it was contended that the sum of Rs. 1999 was the proper sale consideration and had actually been paid by the vendees to the vendors.



[4] The lower Court held in favour of the plaintiff that he was a cosharer and that the defendants were neither exproprietary tenants nor had they any proprietary rights in the village. The lower Court, however, held in favour of the defendants that the correct sale consideration was Rs. 1999 and decreed the plaintiff's suit for pre-emption on payment of that sum within three months of the date of the decree.

[5] The plaintiff has submitted to the decree, but two of the defendants-vendees, Baldeo Singh and Balmakund Singh, have come up in appeal to this Court and they challenge the whole decree and urge that the plaintiff's suit should have been dismissed against all the defendants.

[6] Sir Tej Bahadur Sapru, learned counsel for the appellants, has argued only two points before us. He has urged that the defendants were exproprietary tenants and therefore a suit for pre-emption against the defendants would not lie by reason of s. 9, Agra Pre-emption Act. The other point raised by him is that the plaintiff refused to purchase the property sold and was therefore estopped from bringing the suit. Taking up the first point first, it has been argued on behalf of the appellants that the ancestors of the defendants first party were at one time owners of a fractional share in Taluqa Jamuan. It is their case that Anmol Singh, one of the sons of Jhingur Singh and the ancestor of the defendants first party, had stood surety for his guru and when the debt was not paid by his guru, the creditor realized the amount by selling up the family property in Jamuan. The property was purchased at auction by one Janki Prasad. There is no clear evidence as to when this sale took place, but it is the case of the appellant that it was long before the year 1885. Janki Prasad, however, did not get possession of 42 bighas 7 biswas and 14 dhurs of land which was the sir land of the ancestors of the defendants. Protracted litigations ensued and learned counsel has mentioned that these litigations continued for about a quarter of a century. In the compromise entered into on 27th February 1885, it is mentioned that several periods of limitation had expired since the auction sale. If a period of limitation is roughly taken to be about twelve years, then several twelve years must have elapsed after the auction sale. Ultimately on 27-2-1885 the parties entered into a compromise in which it was settled that the ancestors of the defendants first party would remain in possession of the fields, which were thirty-five in number measuring 42 bighas, 7 biswas and 14 dhurs, as tenants generation after generation on payment of an annual rental of Rs. 101 and this rent was not liable to enhancement nor

were the defendants liable to ejectment. It is by relying on this document that learned counsel for the appellants has urged that the defendants are exproprietary tenants. The defendants produced several witnesses to prove that they were exproprietary tenants and learned counsel placed great reliance on the fact that the defendants' witnesses were not cross-examined on the point that the defendants were exproprietary tenants and not occupancy tenants.

[7] We, however, fail to understand how the defendants can claim to be exproprietary tenants. There is no doubt that the proprietary rights of the defendants' ancestors were sold at auction and were purchased by Lala Janki Prasad long before 1873. As a matter of fact, there is a mention in the compromise dated 27-2-1885 that ejectment proceedings had been taken after the sale against the defendants' ancestors under s. 78 of Act (10 [X] of 1859). So the auction sale must have taken place before 1873 while Act 10 [X] of 1859 was in force. It is admitted by counsel for both parties that there is no provision in the Tenancy Acts nor was ever there any provision under which exproprietary rights could be created by contract. Before 1873 there was no provision that a landlord after the sale of his proprietary rights would be entitled to remain in possession of his sir and khudkasht land as an exproprietary tenant. On the sale of the proprietary rights, the right to actual possession also passed to the vendee and the land held as sir and khudkasht became the vendee's sir and khudkasht.

[8] When the property was, therefore, sold at auction prior to the passing of Act, 18 [XVIII] of 1873—it is mentioned by the learned Civil Judge that the sale took place about 1857 but we can find no evidence to that effect—the purchaser Janki Prasad had the right to take actual physical possession of the 42 bighas odd of land that was in the possession of the defendants' ancestors as their sir. If the defendants' ancestors did not hand over possession of that land and continued to remain in possession they could not claim that they became exproprietary tenants. They were in possession either as tenants of the auction purchaser, Janki Prasad, or were in adverse possession under a claim that they were owners of the 42 bighas odd. It appears, however, from the compromise dated 27-2-1885, that the defendants' ancestors claimed that they had remained in possession as tenants and it is mentioned in the compromise that the dispute was as regards the rent which was fixed by the compromise at the sum of Rs. 101. Exproprietary rights in sir and khudkasht were recognised for the first time by the North Western Provinces Rent Act 18 [XVIII] of 1873 and para. 7 of that Act provides that:



"Every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as sir in such mahal at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at-will for land of similar quality and with similar advantages . . . ."

The sale having taken place prior to 1873, the sir land which had remained in the possession of the defendants, could not become their ex-proprietary tenancy after the compromise of 1885 as there never was any provision for creating ex-proprietary tenancy by contract. Act 18 [XVIII] of 1873 was repealed in the year 1881 by the North Western Provinces Rent Act 12 [XII] of 1881 and this was the Act which was in force on the date when the compromise was entered into in the year 1885. An ex-proprietary tenant is also defined in this Act, but even under this Act the date of the sale is material and there is nothing in S. 7 of the Act which would entitle the Court to hold that it was possible to create ex-proprietary tenancy in land, the proprietary rights in which had been sold prior to the year 1873. In Act 10 [X] of 1859 (to amend the law relating to the recovery of rent in the Presidency of Fort William in Bengal) which was the Act applicable prior to the Act of 1873 we find a mention of only fixed rate tenants and occupancy tenants and there is no mention of ex-proprietary tenants.

[9] Learned counsel had, however, argued that the words "ex-proprietary tenant" and "ex-proprietary tenancy" in S. 9 of the Agra Pre-emption Act 11 [XI] of 1922 need not be read in the same sense as defined in the Rent Acts. When Act 11 [XI] of 1922 was passed, the N.W.P. Tenancy Act (2 [II] of 1901) was in force in these Provinces and an ex-proprietary tenant was defined in S. 10 of that Act. According to this definition,

"every proprietor, whose proprietary rights in a mahal or in any portion thereof, whether in any share therein, or in any specific area thereof, are transferred, on or after the commencement of this Act, either by sale in execution of a decree or order of a civil or Revenue Court or by voluntary alienation, otherwise than by gift or by exchange between cosharers in the mahal, shall become a tenant with a right of occupancy in his sir land, and in the land which he has cultivated continuously for twelve years at the date of the transfer. . . ."

and further

"every such tenant, and every tenant having the same rights under the corresponding provisions of Act 18 [XVIII] of 1873, Act 12 [XII] of 1881, or any other enactment for the time being in force, shall be called an ex-proprietary tenant . . ."

Even according to this definition the sale in favour of the defendants first party having taken place prior to 1873, they cannot claim to be exproprietary tenants.

[10] The Agra Pre-emption Act deals with the pre-emption of village property. The words

"ex-proprietary tenants" and "ex-proprietary tenancy" are words of art and have a special meaning in these Provinces and are defined by the various Rent Acts. To our mind, the words must be interpreted to have the same meaning in the pre-emption Act as in the Rent Acts. The words could not mean, what learned counsel for the appellant has suggested, that an exproprietary tenant was a tenant who had at one time been a proprietor. In that case, a person who had at one time held a share in a mahal, which share had passed out of his hands, could claim to resist a suit for pre-emption merely on the ground that he was a tenant in the village, either occupancy, non-occupancy or statutory or of any other kind. As we read section 9, Agra Pre-emption Act, to our minds, it is clear that what the Legislature intended was that the person who had been a cosharer and who was still holding some land in the village by virtue of the fact that he had been a cosharer and was therefore an exproprietary tenant as defined in the Rent Acts, should be given for this limited purpose the same position as any other cosharer and should be able to resist a suit for pre-emption on the ground that he was not a stranger in the mahal. We, therefore, agree with the finding of the Court below that the defendants were not exproprietary tenants nor were they in possession of any ex-proprietary tenancy.

[11] As regards the plea of estoppel on the ground that the plaintiff had refused to purchase the property, we may mention that no such plea was specifically taken in the written statement. In the written statement, para. 12, all that the defendants had said was that the plaintiff was fully aware of the sale in question because the negotiations had been carried on through the plaintiff and his brother, and then went on to allege that Ram Gobind, the plaintiff's brother, had contributed a sum of Rupees 100 towards the sale consideration as the defendants had run short of money. This statement of theirs was, however, denied by the plaintiff. Ram Gobind Singh came into the witness-box and denied that negotiations for the sale had been carried on through him or that he had ever lent a sum of Rs. 100 for the purchase of the property. Great reliance was placed on the evidence of Suraj Nath Singh, a retired Deputy Collector, who was for several years Special Magistrate at Ballia. He stated that during the pendency of the suit there was a panchayat with the object of settling this case out of Court. The attempt, however, proved abortive. According to Suraj Nath Singh, the plaintiff had admitted at the panchayat that the vendors had gone to him for the sale of the property in dispute but he had told them that he had no interest in the



said property which had belonged at one time to the defendants first set and the vendors should approach the defendants first set for the negotiation of the sale. We find it very difficult to accept this evidence, specially as no such clear plea was taken in the written statement. Moreover, as the learned Judge has pointed out it does not appear that the plaintiff was approached with any definite proposal nor does it appear that any price was mentioned to him. We agree with the finding of the Court below that, there is not sufficient evidence on the record which would justify us in holding that the defendants had purchased the property on the faith of the plaintiff's refusal and that the plaintiff's suit was barred by estoppel.

[12] The result, therefore, is that this appeal must fail.

[13] The lower Court gave the plaintiff his full costs. The plaintiff came into Court on the allegation that he was entitled to pre-empt the property on payment of Rs. 1275 only. The Court below, however, held that the consideration mentioned in the sale deed of Rs. 1999 was the proper sale consideration and that the plaintiff could pre-empt the sale only on payment of Rs. 1999. The plaintiff has now accepted that the sale consideration was Rs. 1999 and does not challenge that finding. The plaintiff having come into Court on a false allegation with the intention of pre-empting the property for less than its two-third value, we think that it was a case where the lower Court should have directed the parties to bear their own costs. We, therefore, modify the decree of the Court below to this extent that we direct that the plaintiff will bear his own costs in the lower Court. With the above modification, we dismiss this appeal with costs.

D.R. *Decree modified.*

**A. I. R. (34) 1947 Allahabad 348 [C. N. 133.]**  
MALIK J.

*Nandram Agarwala—Applicant v. Emperor.*  
Cr. Misc. Case. No. 680 of 1946, Decided on 21-10-46.  
(a) Cotton Cloth and Yarn Control Order (1943),  
Cls. 10, 14 and 15A — Tex-marking under Cl. 10—  
Mode of.

The month that is to be marked, if the marking is put by the Provincial Government on the bales in possession of the dealers which had been surrendered by them or which have been seized by the Government is to be the month and the year when the marking is done.

By a private agreement entered into with the consent of the Textile Commissioner the law as regards tex-marking cannot be altered and an officer of the Government cannot be authorised to put in a certain month a false date that marking had been done in a different month. [Paras 15, 16, 17]

(b) Criminal P. C. (1898), S. 561A—Scope—Interference by High Court to prevent harassment of accused.

High Court is reluctant to interfere with the ordinary course of the law and substitute its own judgment for the judgment of the Magistrate who is trying the case

before the completion of the trial. But where the facts are so preposterous that the High Court feels satisfied that on the admitted facts there is no case against the accused, and where the High Court is clearly of the opinion that a further prolongation of the prosecution would amount to harassment and abuse of the process of the Court, it is the duty of the High Court to interfere under S. 561A, Criminal P. C. and put an end to this abuse. [Para 19]

(46-Com.) Cr. P. C., S. 561A Note 4.

*P. L. Banerji and Shri Rama*—for Applicant.  
*Government Advocate*—for the Crown.

**Order.**—This is an application on behalf of Nandram Agarwala who has been prosecuted under S. 81 (4), Defence of India Rules, for having contravened certain provisions of the Central Cotton Cloth and Yarn Control Order, 1943. It is prayed that the two criminal cases that have been started against him should be quashed and he should be discharged, or in the alternative it is prayed that the cases be transferred to some competent Magistrate outside the district of Ghazipur.

[2] The facts of this case, so far as they are not disputed, are as follows: The Government of India was, from time to time, purchasing large quantities of yarn from the mills for the Government of China. The yarn was delivered to Pekin Syndicate Ltd., at Ghazipur for despatch. In the year 1944 a large amount of excess stock remained in the hands of the Syndicate which was sold with the approval of the Textile Commissioner and thus 1305 bales were sold by auction on 29-7-1944. Out of these 1305 bales 409 bales were purchased by the accused Nandram Agarwala.

[3] These bales were not tex-marked by the manufacturers, nor did they bear any tex-marks by the dealer who may be taken to have been the Pekin Syndicate Ltd. at the time when the bales were purchased by the accused. There were certain terms embodied in the conditions of sale, and I am informed by the learned Government Advocate that these terms were incorporated with the consent and approval of the Textile Commissioner. The relevant clauses in the conditions of sale were:

"3. Time of T. C. B. Marking allowed up to end of August 1944.

4. After T. C. B. Marking period lapses, i. e. 31-8-1944, then 3 months free time for delivery will be given, thereafter storage will accrue at Re. 1 per bale per mensem.

5. All the yarn will lie at the risk and expense of the purchasers.

7. All the bales will be marked with the ex-mill ceiling price and the ceiling retail prices as on date of auction."

Before I proceed further, I may mention that in a letter, Ex. 22, written by the Deputy Secretary to the Government to the District Magistrate of Ghazipur it was mentioned that directions had been issued to the District Magistrate



of Ballia, Azamgarh and Benares, to direct their piecegoods Inspectors and the other local staff to stamp the cloth and yarn sold by auction from the godown of the Pekin Syndicate Ltd., and the Deputy Secretary mentioned that he hoped that with the assistance of this staff the stamping of the cloth would be done within two weeks. It was thus contemplated that the marking would be completed and yarn so marked delivered to the purchaser in August 1944. It was further mentioned that the purchasers should be told that before the yarn was put on sale at destination they must insert a slip in each bundle, failure to do which would lead to the confiscation of the yarn at the destination. These slips, I am told, had to be printed by the Supply Department and furnished to the accused for insertion in the bundles.

[4] The Cotton Cloth and Yarn Control Order did not contemplate a case where the yarn would be acquired by the Government direct from the mills and it would not bear the tex-marks which were required under Cl. 10 of the said Order. Clause 10 provides that

"the Textile Commissioner may, by notification in the Gazette of India, specify—

(c) The markings to be made by the manufacturers and dealers on any class or specification of cloth or yarn manufactured or sold by them and the time and manner of making those markings."

There are two notifications that were issued by the Textile Commissioner in accordance with the provisions of this clause. One concerns the dealers and the other the manufacturers of cotton cloth and yarn. We are not concerned in this case with the notification which referred to the manufacturers of cotton cloth and yarn. The relevant portion of the notification, which referred to the dealers of yarn, was in these terms:

"... cloth or yarn not disposed of within the period specified in Cls. 14 (1) (b) and 14 (2) (b) of the said Order may be kept and sold by a dealer, namely—

(1) Such cloth or yarn as aforesaid shall not be kept or sold unless it bears the special marking stamped or impressed upon it by the Provincial Government which has seized it or to which it has been surrendered for the purpose of such marking."

The rest of the notification provided for the manner of marking to which I will come later in the judgment. The proviso to clause 15-A of the notification then provided that

"no such cloth or yarn shall be kept undisposed of by any dealer, or by any person holding on behalf of a dealer, for more than 6 months after the date of such marking."

[5] Under the terms of the sale, which I have already quoted, the marking was to be done within 31.8.1944. This marking consisted of putting the tex-mark, which, in this case, had to be a map of India with letters T.C. B, on the bales along with the month and year

of marking and certain printed slips had to be attached to the bundles inside the bale. I am informed that there are usually 40 bundles in each bale. The slips and tex-mark also contained the ex-mill ceiling price and the ceiling retail price. The idea behind these markings and these printed slips, which were to be attached evidently, was to prevent black-marketing and hoarding so that the manufacturers and the dealers may be obliged to sell the goods within the period provided, and may not be able to keep them back in the hope that they would get better prices later, and the price had to be marked on the bale and included in the bundle so that the purchaser may know what was the control ex-mill and retail price of the goods.

[6] It is now admitted that the officers of the Government did not know these prices, that is, the ex-mill ceiling price and the ceiling retail price, which was prevailing on the date of the auction till 23.9.1944 and it was after they came to know of these prices that the order was placed for printing of the slips. I was informed by Mr. Banerji, learned counsel for the accused, that the slips were received in the Supply Department on 2.10.1944. The learned Government Advocate objects that there is nothing on the record to show when the slips were received. We can, however, take it that the slips were received by the Supply Department within a few days of the date of the order, that is sometime after 24th September. It is the case on behalf of the accused that the tex-marks were not put on the bales till 23.11.1944. It was admitted by a witness for the prosecution—and it was also conceded by the special counsel engaged by the prosecution—that the printing of the slips commenced on 24.9.1944. We can, therefore, take it that the slips could not have been handed over to the accused till a few days after that date.

[7] As regards the tex-marks, the case for the accused was that the tex-marking was not completed till 23.11.1944. Learned counsel has shown to me an order of the trying Magistrate dated 27.6.1946, in which he mentioned that it had been clearly admitted by Mr. Mohd. Waqil, prosecution witness, that tex-marking actually went on up to 11.11.1944, and then the Magistrate said that he was fully prepared to concede that the actual tex marking on these bundles might be taken to have been done on the last date of the tex-marking of slips as stated by Mr. Mohd. Waqil, prosecution witness, i. e. 11.11.1944. It must be mentioned that the month and year put on the bales was August 1944, although it is clear that the marking was done much later. Similarly, the slips bore the month of August 1944.

[8] The admitted facts, therefore, are that the actual tex-marking was completed on some date in



the month of November 1944, and the learned Magistrate trying the case has accepted it that it may be taken to be 11th November. It is also now admitted that the slips were not available for delivery to the accused before either the end of September or the beginning of October. The case of the accused is that after the tex-marking was completed, the bales were delivered to him on 23-11-1944, and, on that date, he was given the printed slips, as it was not possible to place these slips in the bundles inside the bales which were bound with iron hooks. On 29-11-1944 the accused sold 409 bales to Amar Nath Agarwal of Calcutta, 277 bales were despatched to the buyer and 132 bales remained in the possession of the accused at Ghazipur. It is mentioned in the affidavit that all the 409 bales could not be immediately sent to the vendee as there was some difficulty in getting railway wagons. However that may be, on 19-2-1945, 101 bales were booked for Cawnpore, according to the instructions of the buyer from Tarighat on the East Indian Railway which is the nearest railway station for Cawnpore from Ghazipur. 64 bales reached Dildarnagar on or about 14th March 1945, and they were seized by the officers of the Supply Department. On the same date 37 bales that had remained at Tarighat railway station were also seized. The remaining 31 bales had been sent to a village near Dildarnagar by other means of transport and they were seized on 5th April 1945.

[9] The first case is with reference to 101 bales, 64 out of which had been seized at Dildarnagar while they were in the custody of the railway and 37 bales at Tarighat railway station before they could be despatched by the East Indian Railway. The second is with reference to 31 bales that were seized at some village near Dildarnagar on 5th April 1945.

[10] The sanction for the prosecution of the first case was given by the District Magistrate, Rai Bahadur Mr. Rama Kant on 30th March 1945, and for the second was given by Mr. Bhagwati Prasad, District Magistrate, on 5th May 1945. The charge against the accused in the first case reads as follows:

"That you on or about 14th day of March 1945 at Tarighat were found in possession of 101 bales of cotton yarn which were possessed by you unopened and without being disposed of beyond six months from the date of tex-marking of the yarn. And that you thereby committed an offence punishable under S. 81(4), D. I. R. and within my cognizance by contravening S. 14(2) and proviso to S. 15A, Cotton Cloth and Yarn control Order, 1945 (1943)."

[11] The charge in the second case is:

That you on or about the 3rd day of April 1945 at V. Bahlolpur had in your possession 31 bales of Cotton yarn without having tex-mark and price slips on them and further that you held this stock beyond six months from the date of tex-marks on the cotton yarn undisposed in your possession. And that you thereby

committed an offence punishable under section 81(4) of D. I. R., by contravening the provisions of S. 13(i)(c) and the provisions of S. 15A of Cotton Cloth and Yarn Control Order, 1945 (1943?)."

[12] Mr. Peare Lal Banerji on behalf of the accused has urged that on the admitted facts of the case no offence can be deemed to have been committed. According to him, the tex-marking has now been admitted and held to have been completed at least not before 11th November 1944, and the printed slips were not handed over to the accused before the end of September or the beginning of October 1944. He has urged that his client had, therefore, six months time from after the date when the tex-marks had been put on within which period he could dispose of the goods and from the facts stated above it is clear that he had still considerable time to do so.

[13] A long affidavit has been filed in support of the application and from the affidavit it appears that a letter was sent by the Deputy Secretary to the Local Government to the District Magistrate on 27th March 1945, that if the marking was made, as a matter of fact, in September, then the purchaser would be entitled to dispose of the bales within six months of the marking, but in spite of that letter the prosecution was sanctioned and was started and it has now been going on for a year and a half and I am informed a special counsel has been appointed to conduct the prosecution. It is mentioned in paragraph 11 of the affidavit that the reason for this zeal is not the vindication of the law but the annoyance at the fact that the accused refused to pay bribe to the District Supply authorities. It appears from the affidavit that a representation was made to the Local Government and the Local Government asked Mr. Beggie, Deputy Textile Controller and head of the Enforcement Branch, Cawnpore, U. P., to make an enquiry. Mr. Beggie is said to have made an enquiry and submitted his report some time in August or September 1945, and from that report, a portion of which has been reproduced in paragraph 16 of the affidavit, it appears that Mr. Beggie was satisfied that the intention behind the prosecution was to harass the accused. He further said that

"it is reported by a reliable source in Ghazipur that the D. S. O., P. G. Is and D. M. and his staff were linked together and were in the habit of taking bribes and huge pretty amounts from the public."

[14] The District Magistrate and the prosecuting Magistrate in their explanations say that they did not know anything about Mr. Beggie's report, but notice of this application and a copy of the affidavit was served on the Government Advocate on 1st July 1946, and I should have thought that since then the prosecution had sufficient time to find out if the quotation in



the affidavit was, in any material particular, incorrect. If the allegations were as stated in this affidavit, I should have thought that the Local Government and the prosecution would be more concerned with making enquiries into the conduct of their officers rather than with this prosecution which, after all, even if the entire argument is accepted on behalf of the Government-Advocate, would amount to a mere technical offence.

[15] I have already set out above the charge against the accused. The facts being now admitted by the prosecution that the tex-marking was not completed till some date in the month of November and the printed slips were not ready for delivery to the accused before the beginning of October or the end of September, it is urged that it is not the date when the tex-marking was done that is relevant but this Court must consider the last day of the month marked on the cloth or yarn as the relevant date. No doubt under cl. 14 of the Rules it is mentioned that no person shall buy or sell or keep in his possession any such cloth or yarn in unopened bales or cases for more than six months after the said date, and the said date is said to be the last day of the month marked on the cloth or yarn in accordance with the directions of the Textile Commissioner under cl. 10, but the other provisions of this order and the notifications issued thereunder make it clear that the month that is to be marked, if the marking is put by the manufacturer, is the month of delivery and if it is put by the Provincial Government on bales in the possession of dealers which had been surrendered by them or which had been seized by the Government, it is to be the month and year when the marking is done. Under cl. 10 of the Rules, the Textile Commissioner has, by notification in the Gazette of India to direct how the marking is to be made by the manufacturer or by the dealer, and under notification No. 100 printed at p. 128 of the Civil Supplies Manual it is the month and the year of marking which is to be stamped or impressed on the bales.

[16] The learned Government Advocate has urged that it is at the sweet will and pleasure of the Provincial Government to put down any month and any year that they choose and therefore the sales should have been within six months of August 1944 being the dates put on the bales and the slips. I am not prepared to accept that contention. To my mind, the rules and the notifications clearly provide that it is the month and the year when the marking is done which should be the month and the year put down on the bales and this is obvious because it is after that that the dealer is given further six months within which to sell his goods. I have already said be-

fore that though the tex-marking was done in the month of November 1944 on the bales August 1944 was marked and similarly on the printed slips the month of August 1944 was printed. If the learned Government Advocate relies on the fact that the six months are to be reckoned from the last day of the month marked on the yarn, he must also bear in mind that the month has to be marked in accordance with the directions of the Textile Commissioner under cl. 10, and I can find nothing in that clause or in the notification which authorises an officer in the Supply Department to put a month other than the month in which the marking was actually done.

[17] Learned counsel has then urged that the terms and conditions of sale which were settled with the approval of the Textile Commissioner altered the law and in this particular case it must be deemed that the officers of the Supply Department were entitled to put the month of August 1944 as the month of marking even though they were doing it in the month of November. So far as I can read the rules, the Textile Commissioner has in certain cases only the right to make an exception in the case of a dealer who is not able to comply with the provisions of law and sell his goods within a certain period and give him the extended period of six months under S. 15-A. I do not think that by a private agreement entered into with the consent of the Textile Commissioner the law as regards tex-marking contained in the Cloth and Yarn Control Order and in the notifications can be altered. Further I do not think the conditions of sale are capable of this interpretation that any officer was authorised to put in the month of November a false date that the marking had been done in August. All that the condition of sale provided was that the marking would be done within 31st August 1944. If the Supply Department thought that they had a right to mark these bales only up to that date, I do not see why they should have done the marking in the month of November.

[18] Learned counsel for the Government has also urged that if the Supply Department wrongly marked the bales, it must be held that the bales were not marked at all in accordance with the provisions of clause 10 and the accused must be held to be guilty for being in possession of bales which had not been marked in accordance with the provisions of law. This argument comes with ill grace from the prosecution. Firstly, that is not a part of the charge and is only an attempt to make out entirely a new case, and secondly, if the officers of the Provincial Government delayed marking these bales and put down a wrong month at the time of



the marking, then instead of prosecuting their own officers who, on its contention, were guilty, it cannot with any sense of justice proceed against the dealer who after all had to take the goods as marked by its officers.

[19] To my mind, the present prosecution amounts to an abuse of the process of the Court. This Court is reluctant to interfere with ordinary course of law and substitute its own judgment for the judgment of the Magistrate who is trying the case before the completion of the trial. But, in my opinion, where the facts are so preposterous that this Court feels satisfied that on the admitted facts there is no case against the accused and where this Court is clearly of the opinion that a further prolongation of the prosecution would amount to harassment and abuse of the process of the Court, it is the duty of this Court to interfere under S. 561A, Criminal P. C., and put an end to this abuse.

[20] As I have already said, the most that can be said for the prosecution, putting a very limited interpretation on the language of clause 14 (2), is that though the tex-marking was actually done in November, the tex-marking bore the month of August 1944 and the cloth should have been disposed of within six months from August 1944. But I am satisfied that it is not a correct interpretation, and when the tex-marking was not done by the officers of the Government before November 1944 the prosecution can hardly afford to take such a strict view and make such a fuss about vindicating the law. That is all that I need say so far as the first case.

[21] In the second case the charge consists of two parts. The first is that the 31 bales of cotton yarn had not the price slips in them at the time when they were taken into custody. When the learned trying Magistrate inspected these bales he found that most of the bundles contained the slips. The suggestion for the prosecution is that the slips had been put in after the bales were seized. There is no evidence on the record to justify such a serious allegation. The term, as proposed by the U. P. Government contained in the letter from the Deputy Secretary to the District Magistrate, was that the purchasers should be told that "before the yarn is put on sale at destination, they must insert in each bundle one slip." The obvious meaning of this was that if the slips had not been put in the bundles before they were despatched at Ghazipur they should have been put in at the destination before they were delivered to the purchasers. It is the case for the prosecution that when these goods were seized they were still in the custody of the accused and he had

not parted with the possession of those bales. It could not, therefore, be said that by not inserting the slips before he started carrying the goods from Ghazipur he had already completed a breach of the rule or of the notification. In the absence of any evidence that the slips were inserted after seizure while the bales were in the custody of the officers of the Provincial Government, I do not think that it is of any use that the prosecution on this part of the charge should go on any further. The second part of the charge in this case is exactly similar to the charge in the first case already disposed of by me above and it is not necessary for me to add anything further to what I have said.

[22] After considering the whole matter, I feel satisfied that it is a fit case where I should exercise the jurisdiction of this Court under S. 561-A, Criminal P. C., and direct that the prosecution should be quashed, and I order accordingly.

[23] Learned counsel for the accused has prayed that I should direct that the bales should now be handed over to the accused. The learned Government Advocate has urged that the Textile Commissioner should be approached in this connexion, and I have no doubt that proper orders will be passed by him. In case it is necessary I give leave to the accused to move this Court again.

N.S.D.

*Order accordingly.*

**A. I. R. (34) 1947 Allahabad 352 [C. N. 134.]**

**VERMA AND HAMILTON JJ.**

*Munnu Chamar — Defendant — Appellant v. Hari Narain and another, Plaintiffs and another, Defendant — Respondents.*

Second Appeal No. 1541 of 1943, Decided on 28-3-1946, from decision of Civil Judge, Mirzapur, D/- 25-2-1947.

(a) Specific Relief Act (1877), S. 42, Proviso—Object of— "Further relief", meaning of—Suit for declaration that property is not liable to attachment and sale in execution— Relief of injunction.

The object of the Proviso is to prevent a multiplicity of suits by preventing a person from getting a mere declaration of right in one suit and then seeking the remedy, without which the declaration would be useless and which could have been obtained in the same suit in another. The "further relief" must be a relief flowing directly and necessarily from the declaration sought and a relief appropriate to, and necessarily consequent on, the right or title asserted. [Para 5]

In a suit by the sons for a declaration that the property, which is attached by the decree-holder in execution of his decree against the father alone, belonged to the joint family and was not liable to attachment and sale in execution of that decree, it is not necessary for the sons to seek further relief (than mere declaration) in the shape of an injunction restraining the decree-holder from executing the decree in question by attachment and sale of that property: 26 All. 606 and 30 A. I. R. 1943 P. C. 94, *Rel. on.* [Para 5]



(b) Limitation Act (1908), Art. 182, Cl. 5—  
“Application in accordance with law” — Relief asked for, not capable of being granted.

The expression “applying in accordance with law” must mean applying to the Court to do something in execution which by law that Court is competent to do and it does not mean applying to the Court to do something which, either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law, he must have known the Court was incompetent to do. 12 All 64. *Foll; Case law discussed.* [Para 8]

Thus, an application made to a Court of Small Causes for execution of a money decree by attachment and sale of immovable property is not in accordance with law, within the meaning of Cl. (5) of Art. 182. The fact that the decree to be executed was passed by such Court is immaterial. [Paras 7 and 12]

(‘42-Com.) Limitation Act — Art. 182 Note 52 pt. 3.

*Cases referred :—*

1. (‘04) 26 All. 606, Ganga Ghulam v. Tapesbri Prasad.
2. (‘43) 1943 A. L. J. 290: 30 A. I. R. 1943 P. C. 94: I. L. R. (1943) Kar P. C. 93: 207 I. C. 188 (P. C.), Humayun Begam v. Shah Mahomed Khan.
3. (‘90) 12 All. 64, Chattar v. Newal Singh.
4. (‘26) 48 All. 468: 13 A. I. R. 1926 All. 95: 90 I. C. 938: 24 A. L. J. 137, Shev Prasad v. Mt. Naraini Bai.
5. (‘05) 27 All. 619, Munawar Husain v. Jani Bijai Shankar.
6. (‘06) 28 All. 387, Langtu Pande v. Baijnath Saran.
7. (‘21) 43 All. 550: 8 A. I. R. 1921 All. 208: 63 I. C. 362, Jamilunnissa Bibi v. Mathura Prasad.
8. (‘26) 13 A. I. R. 1926 All. 345: 93 I. C. 292, Ram Raj v. Mt. Umraji.
9. (‘30) 52 All. 11: 16 A. I. R. 1929 All. 625: 118 I. C. 17 (F. B.), Kayastha Co., Ltd. v. Sita Ram Dube.

C. S. Saran — for Appellant.

Walter Datt and P. N. Haksar — for Respondents.

**Verma J.** — The appellant was defendant 2 in the suit which was brought by the first two respondents for a declaration that a certain house, belonging to the joint family of which the plaintiffs were members with their father (defendant 1 and respondent 3), was not liable to attachment and sale in execution of a money decree obtained by defendant 2 against defendant 1. The first Court dismissed the suit but, on appeal by the plaintiffs, the lower appellate Court granted a declaration in respect of only the plaintiffs' share in the house on the ground that their father could, if necessary, raise the objection in the execution Court under S. 47, Civil P. C.

[2] The material facts are these. On 1.1.1929 respondent 3, Behari (father of the plaintiffs) executed a promissory note in favour of the appellant for a certain sum of money. In the year 1932, the appellant brought a suit, being suit No. 23 of 1932, in the Court of Small Causes against Behari alone for the recovery of the amount due under the promissory note. It was not alleged by the present appellant in that suit that he had impleaded Behari not only in his personal capacity but also as the Manager of his joint family; in other words, the suit was solely against Behari and not in any manner against the joint family. The suit was

decreed on 18-2-1932. Thereafter, the appellant started execution proceedings. It is not necessary to give the details of all the applications. It is sufficient to say that he filed three applications, one after the other. The prayer in all of them was that the decree be executed by the attachment and sale of the house in question and they were all filed in the Court of a Munsif within whose jurisdiction the house was situated. The third of these applications was dismissed on 4-12-1935. He applied for the fourth time, making the same prayer, on 5-9-1938, but, for some unknown reason he filed this application in the Court of Small Causes. For obvious reasons that Court held that it had no jurisdiction to entertain an execution application in which the prayer was for the attachment and sale of immovable property and we are told by an order, passed on 18-5-1939 “sent” the application to the Munsif's Court. It is difficult to see how it could send such an application to the Munsif's Court. The proper order to pass was that the application be returned to the decree-holder for presentation to the proper Court. The decree-holder did not file any fresh application for execution in the Munsif's Court. Thus, even taking a view most favourable to the decree-holder, the earliest date on which he can be said to have made an application for the fourth time in accordance with law to the proper Court for execution was 18-5-1939. It will be noticed that this was more than three years since the date on which the order on the third application was passed, viz. 4-12-1935. The fourth application for execution was dismissed on 21-7-1939. A fifth application was filed and in pursuance thereof the entire house in suit was attached. The exact details of this fifth application (e.g., the date on which and the Court in which it was filed, the nature of the proceedings which preceded the attachment, the Court by which the attachment was ordered, etc.) are not available. It is clear, however, that when the attachment was made, the suit giving rise to this appeal was instituted. The plaintiffs based their claim on two grounds: (1) that the debt incurred by their father, Behari, under the promissory note dated 1-2-1929, was tainted with immorality, and (2) that, in any event, the decree in execution of which the attachment had been made was no longer executable as its execution had become barred by limitation and that, therefore, the attachment was illegal. The trial Court held on both these points against the plaintiffs. The lower appellate Court agreed with the trial Court on the first question and held that the plaintiffs had failed to prove that the debt was tainted with immorality. On the second question, however, it differed from the trial Court and held that the execution of



the decree was barred by time and that therefore the attachment in question was illegal. It accordingly allowed the plaintiffs' appeal and decreed the suit: hence this appeal by the decree-holder-defendant.

[3] The first point raised by Mr. C. S. Saran for the appellant was that a suit for a declaration that an application or suit was barred by time was unknown to law. It is sufficient to say, with regard to this argument, that the suit with which we are concerned did not ask for any such declaration. As has been shown above, the suit giving rise to this appeal was for a declaration that the house in question was not liable to attachment and sale in execution of the decree which the second defendant had obtained against the first defendant. It has not been suggested, and cannot be suggested, that such a suit does not lie.

[4] It was next contended that the plaintiffs had no cause of action for the suit. An examination of the pleadings, however, made it clear that this contention was groundless. It was stated by the plaintiffs in para. 4 of the plaint that defendant 2 had on 18-2-1932, obtained from the Court of Small Causes at Mirzapur in suit No. 23 of 1932 an *ex parte* decree against the first defendant on the basis of a *ruqqa* alleged to have been executed by the defendant 1 alone on 1-1-1929 and that the defendant 2, in execution of that decree, had attached the ancestral residential house, specified below, and had got it proclaimed for sale, the date fixed for sale being 11-11-1940. All that defendant 2 stated in his written statement about this paragraph of the plaint was: "Paragraph 4 of the plaint is not admitted in the way in which it is written". There were several statements in paragraph 4 of the plaint and it is not possible to know which of those statements was intended to be denied by this vague clause in the written statement. The matter is, however, put beyond doubt by para. 5 of the additional pleas of the written statement in which the second defendant-appellant himself described the house as the house under attachment (*makan-e-maqruqa*) and pleaded that it was liable to sale. It is clear, therefore, that the allegation of the plaintiffs that the house in question had been attached in execution of the decree was correct. The plaintiffs, thus, had ample cause of action for the suit.

[5] The third point raised by the learned counsel—and considerable stress was laid on it—was that the suit offended against the proviso to s. 42, Specific Relief Act, and that the plaintiffs could not therefore be granted the declaration asked for. The contention is that it

was necessary for the plaintiffs to seek further relief than a mere declaration in the shape of an injunction restraining defendant 2 from executing the decree in question by attachment and sale of the house in suit and that no such further relief having been sought, the declaration prayed for ought to be refused. In our judgment this is a wholly untenable argument. The object of the proviso is to prevent a multiplicity of suits by preventing a person from getting a mere declaration of right in one suit and then seeking the remedy, without which the declaration would be useless and which could have been obtained in the same suit, in another. As has been pointed out in various judgments of the Courts, the expression used by the Legislature is not "other relief" but "further relief". The further relief must be a relief flowing directly and necessarily from the declaration sought and a relief appropriate to, and necessarily consequent on, the right or title asserted. Does the argument of the learned counsel stand any of these tests? Can it possibly be said that the declaration prayed for by the plaintiffs in the present suit would, if granted, be futile without the injunction suggested? All that the plaintiffs will have to do after obtaining the declaration is to file a copy of the decree, granting the declaration, in the execution Court and that Court is bound to accept it. Can it possibly be argued that, after obtaining this declaration, the plaintiffs will have to bring another suit asking for the injunction suggested by the learned counsel? Will it be correct to say that the relief of injunction as suggested by the learned counsel, is appropriate to, and necessarily consequent on, the right or title asserted by the plaintiffs or that it flows directly and necessarily from the declaration sought? The answer to these questions must, in our opinion, be in the negative. The suit out of which this appeal has arisen is a well-known form of action and it has never been suggested by any Court that an injunction of the nature contended for by the learned counsel must be sought in such a suit. We asked learned counsel to suggest any suit in which, according to him a mere declaration could be granted, if his argument that the injunction suggested by him ought to have been sought in the present suit was accepted, and the learned counsel could not suggest a single case. To illustrate the point, let us take illust. (a) to s. 42, Specific Relief Act. If the contention raised by Mr. Saran is accepted, it would have to be held that the Illustration

"A may not sue for a declaration that the inhabitants of the neighbouring village are not entitled to the right of way claimed by them across the land without further asking for an injunction restraining those inhabitants from claiming any such right."



[6] The point is, in our opinion, elementary, and it is really not necessary to cite any authorities. Reference may, however, be made to the case in 26 ALL. 606.<sup>1</sup> The fact, that the decree in execution of which the property was sought to be sold in that case was a mortgage decree, is of no materiality, so far as the principle is concerned. The important point is that, if the argument put forward before us by Mr. Saran were sound, it would have been held by the Court in that case that it was necessary for the plaintiff to ask for an injunction restraining Tapesri Prasad from putting the property to sale in execution of his decree. What was held, however, was that there was no obligation on the plaintiff, under the proviso to S. 42 to have asked for any further relief than one of mere declaration. It was observed that

"all that the plaintiff wanted, and all that the law compelled him to ask for, was to have the cloud on his title, which was caused by his property being proclaimed for sale, removed, and to achieve that it was not necessary to ask for any further relief".

It may be pointed out that it has not been suggested that the plaintiffs in the case before us are not in possession of the house in question and that it was necessary for them to pray for possession. We may also refer to the decision of their Lordships of the Privy Council in 1943 A. L. J. 290<sup>2</sup>. In that case the plaintiff was the wife of respondent 1. She had handed certain money, which belonged to her, to her husband to be put on deposit in the bank in their joint names. At the time of the suit, viz. on 15th September 1934, the said money, after a number of transfers and renewals by the husband, was lying in certain banks in the names of the husband and his son (defendant-respondent 2) in fixed deposit which was to mature on 1st October 1934. The plaintiff sued for a declaration that the said sums of money, which were held by the banks on deposit receipts, were her property and not her husband's. She made the banks, as well as the husband and the son, defendants to the suit. It was concurrently found by the Courts in India that the facts alleged by the plaintiff were true and that the moneys in question were her property and did not belong to her husband or her son. The trial Court decreed the suit, but the Chief Court reversed that decree on the ground that under S. 42, Specific Relief Act, the plaintiff was not entitled to the declaration that she asked. Their Lordships of the Privy Council allowed the plaintiff's appeal and, reversing the decree of the Chief Court, restored that of the trial Court. Mr. Saran has tried to distinguish the case on the ground that the banks had been dismissed from the suit, that the action thereafter had been one only against the husband and the son and that that was the basis of their

Lordships' decision. The fact, however, remains that, if there were any substance in the argument raised before us by Mr. Saran, their Lordships of the Privy Council would have upheld the decree of the Chief Court on the ground that the plaintiff was bound to ask for an injunction restraining the husband and the son from putting forward the claim that the money belonged to them and from asking the banks to pay it over to them. The contention must, therefore, be rejected.

[7] The next and last point raised was that the decision of the lower appellate Court, that the attachment was illegal because the decree, in execution of which the attachment had been made, was no longer executable as its execution had become barred by limitation, was incorrect. This argument must, in our opinion, be rejected for, so far as this Court is concerned, the matter has been settled by a series of decisions which are all one way. It will be sufficient to refer only to a few of them, and we shall do so presently. The relevant statutory provision is contained in para. or cl. 5, col. 3, Art. 182, Limitation Act (9 [IX] of 1908). The appellant argues that the date from which time must be taken to run is 21-7-1939, that is, the date on which the fourth application for execution was dismissed. That at once raises the question whether the application for execution which was dismissed on 21st July 1939, was an application "made in accordance with law to the proper Court". That application was the one made on 5th September 1938, and it will be recalled that, although the prayer was that the decree be executed by the attachment and sale of immovable property, viz. the house in question, it was filed in the Court of Small Causes. It will also be recalled that the Court of Small Causes declined—as it was bound to do—to entertain it and, on 18th May 1939, passed an order "sending" the application to the Munsif's Court. The result is that, even taking a view most favourable to the appellant, the earliest date on which the appellant can possibly be said to have filed the fourth application for execution in accordance with law to the proper Court is 18-5-1939. By that time, however, an application for the execution of the decree had become barred by limitation, as the time for making such an application had run out by 4-12-1938. It was however contended for the appellant that the application made to the Court of Small Causes on 5th September 1938 was an application made in accordance with law to the proper Court. The question is whether this contention can be accepted. Our conclusion is that it cannot be accepted.

[8] The first case to which we wish to refer is that in 12 ALL. 64.<sup>3</sup> It was held there that



the expression "applying in accordance with law" must mean applying to the Court to do something in execution which by law that Court is competent to do, and that it does not mean applying to the Court to do something which, either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law, he must have known the Court was incompetent to do. That was a decision under Art. 179 of Act 15 [XV] of 1877, but Act 9 [IX] of 1908 made no change in the paragraph or clause with which we are concerned. Subsequently by Act 9 [IX] of 1927 an amendment was made by which the words "the final order passed on an application" were substituted for the word "applying." That also does not affect the question before us. The case just cited has always been regarded as the leading case on the subject in this Court.

[9] We shall next refer to the case in 48 ALL. 468.<sup>4</sup> The report in the Indian Law Reports is not satisfactory. The judgment has been reproduced in full in 24 A.L.J. 137.<sup>4</sup> We have also sent for the paper-book and perused the original judgment. The essential facts of that case were these. The appellant, Sheo Prasad, obtained a money decree against the husband of the respondent, Naraini Bai, from the Court of the Munsif, East Budaun, on 9-3-1915. On 12-11-1918, he filed an application for execution. This application was within time, as he had already made two earlier applications for execution which had both been struck off for non-prosecution, and the application of 12-11-1918 was his third application. This third application was struck off on 23-1-1920, with the decree-holders' consent. He then made a fourth application for execution on 4-3-1921. This application was filed in the Court of the Munsif, East Budaun, and the prayer was that certain property be attached and sold. All the property sought to be attached and sold was, however, situated outside the jurisdiction of the Court of Munsif, East Budaun. Consequently, the application was rejected on 29-4-1921. He then applied for execution for the fifth time on 12-1-1923. This application was dismissed by both the Courts below on the ground that it was time-barred. The Courts held that limitation was not saved by the application filed on 4-3-1921, because that application was not one in accordance with law. The decree-holder filed a second appeal in the High Court. The learned Judges, who heard the appeal, observed, after stating the facts, that "the sole question" which arose for their consideration was whether the proceedings on the application of 4th March 1921, constituted an 'application in accordance with law to the proper Court for execution or to take some step-in-aid of execu-

tion'. A little lower down they again made this observation:

"There is, therefore, only one question remaining for determination namely, do the facts, that all the property specified was outside the jurisdiction of the Court and that there was no prayer at any time before the application was struck off (though the Court allowed time for amendment) to transfer the decree for execution to the Court in whose jurisdiction the property was situated, render the application of 4th March 1921, one 'not in accordance with law'? In spite of the fact that, this was the sole question which arose for determination the learned Judges proceeded to consider whether the application of 4th March 1921, had been made with the "bona fide intention of proceeding to execution" or it had been made "merely with the intention of saving limitation." A long discussion of this matter followed and the conclusion arrived at was that it was "impossible to hold that the application of 4th March 1921, was a bona fide application with the intention of obtaining execution."

What had been stated to be the sole question that had arisen for determination was taken up towards the end of the judgment as "the second point." Reference was made to the cases in 12 ALL. 64,<sup>3</sup> 27 ALL. 619<sup>5</sup>, 28 ALL. 387<sup>6</sup> and 43 ALL. 550<sup>7</sup>, and it was held that, at any rate, so far as this Court was concerned, it was well settled that, where the Court in which the application for execution was filed could not give the relief asked for, the application was not one in accordance with law. The learned Judges, accordingly, came to the conclusion that the application for execution filed by Sheo-Prasad on 4th March 1921 "was further not in accordance with law because it was made to a Court which was not competent to grant the relief asked for." In the result the appeal of the decree-holder was dismissed.

[10] We may next mention the case in A. I. R. 1926 ALL. 345<sup>8</sup> in which Sulaiman J. referred to the cases in 27 ALL. 619<sup>5</sup> and 12 ALL. 64<sup>3</sup> and held that "applying in accordance with law" means "applying to the Court to do something which by law that Court was competent to do."

[11] The views expressed by the learned Judges who had decided the case in 48 ALL. 468<sup>4</sup> on the subject of the bona fides of an application for execution gave rise, for somewhat obvious reasons, to considerable discussion and it was felt that the matter required reconsideration. The result was that a Full Bench of five Judges was constituted in the year 1929 for a consideration of the matter—52 ALL. 11<sup>9</sup>—and the following question was referred to it:

"If a decree-holder makes any application or takes any step mentioned in the third column of Art. 182, Limitation Act, will such step be ineffectual to keep his decree alive and to save limitation, unless he can satisfy the Court that he took such step or instituted such proceedings with a genuine intention of obtaining execution of the decree, if reasonably possible, and that he did not abandon such proceedings except upon a genuine belief that it would not be reasonably possible to obtain execution?"



The question was answered in the negative. The result was that that part of the judgment in 48 ALL. 468<sup>4</sup>, in which it had been held that the bona fides or mala fides of an earlier application was an important ingredient in determining whether that application was effective to save limitation for a later application was overruled. The soundness of the other proposition, namely, that the earlier application had to be one in accordance with law, has, however, never been doubted. Having regard to the language of the statute, it is difficult to see how it can be doubted.

[12] Mr. C. S. Saran vehemently argued that, as the application dated 5th September 1938, had been filed in the Court which had passed the decree, namely, the Court of Small Causes, it had been made to the proper Court and could therefore save limitation. It is not necessary to express any opinion on the question whether the application had been made to the proper Court, for, it is sufficient to point out that the statute requires not only that the application should be made to the proper Court but also that it should be in accordance with law. We have already shown that the application made on 5th September 1938, was not one in accordance with law. The appeal is without force. It is accordingly dismissed with costs.

N. S.

*Appeal dismissed.*

A. I. R. (34) 1947 Allahabad 357 [C. N. 135.]

MALIK AND WALI ULLAH JJ.

*Ali Yaqin—Defendant-Appellant v. Bhagwan Das Plaintiff, and others—Defendants-Respondents.*

First Appeal No. 206 of 1943, Decided on 30-4-1946, against decision of Civil Judge, Bijnor D/- 31-5-1941.

Civil P. C. (1908), Order 32, Rule 3—Suit against minor treating him as major—Ex parte decree—On attaining majority, minor suing and getting decree set aside—Suit restored—Limitation—Suit not barred if limitation had not expired at original institution of suit—Limitation Act, S. 3.

The institution of a suit against a minor for whom no guardian is appointed is not a nullity, though a decree passed against him when no guardian ad litem has been appointed will be a nullity. Where a suit is filed against a minor treating him as a major and without having a guardian ad litem appointed for him, and an ex parte decree is passed against him and the minor on attaining majority sues and gets the decree set aside and the suit is restored to the file, the suit must be deemed to be filed on the date of its original institution and not on the date of its restoration. Hence, if the suit was within limitation on the date of its original institution, it would not be barred although the period of limitation for the suit has expired at the time of the restoration of the suit: 17 A.I.R. 1930 All. 644, *Rel. on.* [Para 9].

('44-Com.) C. P. C. O. 32 R. 3 N. 2

('42-Com.) Limitation Act, S. 3 N. 32.

Cases Referred:—

1. ('09) 31 All 572: 36 IA 168 : 3 IC 864 (P.C.), *Rashid-Unnisa v. Muhammad Ismail Khan.*

2. ('26) 13 A. I. R. 1926 All 387: 48 All 362: 93 IC 376, *Daulat Singh v. Raja Ramji.*

3. ('40) 27 A. I. R. 1940 All 256: 1 L R (1940) All 344: 188 IC 784, *Dwarika Halwai v. Sitla Prasad.*

4. ('30) 52 All 924: 17 A. I. R. 1930 All. 644: 128 IC 438, *Talib Ali Shah v. Piarey Lal.*

5. ('12) 12 A. L. J. 1114 : 1 A. I. R. 1914 All. 306: 26 I. C. 84, *Chiranji Lal v. Poorna.*

S. A. Rafique—for Appellant.

Satya Narain Agarwala—for Respondents.

**Malik J.**—This case has had a chequered history. One Ali Tamkin executed a mortgage for Rs. 5000 in favour of Bhagwan Das on 10-6-1922. Various payments were made by or on behalf of the mortgagor till 5-11-1926. For the balance of the amount, a suit No. 9 of 1934 was filed by Bhagwan Das in the Court of the Subordinate Judge of Bijnor, district Moradabad, on 29-5-1934. Ali Tamkin had died before the filing of the suit and Bhagwan Das impleaded as defendant to the action various relations of Ali Tamkin who were his legal representatives under the Muhammadan law. One of such persons who was impleaded was Syed Ali Yakin, son of Ali Hasan. Ali Yakin was impleaded as a major and no prayer was made in the plaint for appointment of his guardian. On the date of suit he was above eighteen years of age but his mother had been appointed a certificated guardian and under the law he was, therefore not a major till he had attained the age of twenty one. The suit does not appear to have been contested and it was decreed *ex parte*. Ali Yakin became a major, that is, completed the age of twenty one, on 26-8-1936. He filed a suit No. 3 of 1940, for setting aside the decree obtained against him in suit No. 9 of 1934 on the ground that he was a minor and that all the proceedings against him were not binding and were nullities. The suit was decreed on 26-4-1940. The operative portion of the judgment is as follows:

"By way of result it is ordered that suit for declaration is decreed such wise that it is declared that Decree No. 9 of 1934 of the Court of the Civil Judge Bijnor is not binding on the plaintiff and that the plaintiff is readmitted to his original rights. Either of the two parties may apply for the revival of the said previous suit of 1934 . . . ."

The very next day, the 27th of April 1940 Bhagwan Das filed an application for revival of the suit, No. 9 of 1934. This was opposed on behalf of Ali Yakin, but the application was granted on 9-11-1940, and the suit was revived on that date. The defendant, Ali Yakin, filed a written statement and took the following pleas: (1) that the plaintiff had no cause of action against him, (2) that the defendant had no knowledge of any such hypothecation bond having been executed by Syed Ali Tamkin and even if there was such a bond it was not executed and completed as a hypothecation bond, (3)



that the claim was barred by time, (4) that Bhagwan Das, plaintiff, had under a deed of gift transferred the mortgagee rights to his son, Gopi Saran, and that he had, therefore, no right to file a suit, and (5) that Syed Ali Tamkin had no right to hypothecate the property given in the plaint as the said property was a perpetual 'muafi' under the Pensions Act and that it was not, therefore, transferable or saleable.

Though Ali Yakin had in his written statement raised as many as five points, the learned Civil Judge framed only two issues, the first issue being, whether the plaintiff has a right to sue, and the second, what rate of interest should be allowed to the plaintiff under the new Act, 13 [XIII] of 1940.

[2] On the second point, the learned Judge held in favour of the defendant and gave him the benefit of the Debt Redemption Act. As the plaintiff has filed no cross-objection, that point is, therefore, set at rest by the decision of the learned Civil Judge. The other issue, whether the plaintiff has a right to sue was decided by the learned Civil Judge in favour of the plaintiff as he held that the deed of gift was a fictitious transaction which had not been acted upon and which had not been accepted by Gopi Saran. That finding is challenged in appeal.

[3] On 10.9.1928, Bhagwan Das executed a deed of gift. One of his sons, Mutsaddi Lal, had died leaving a minor son named Anand Kunwar. He purported to give certain bonds in favour of this minor, Anand Kunwar, under the guardianship of his mother, Mt. Basanti Devi. He had three surviving sons of whom Babu Ram was an adult and Prakash Chandra and Gopi Saran, were minors. By the deed he purported to give the bond in suit to Gopi Saran, minor, under the guardianship of Gopi Saran's mother, Mt. Jwala Dei. He gave certain other documents to Babu Ram and he purported to give a few others to the other minor son, Prakash Chandra. One of the documents given to Babu Ram was another mortgage deed executed by Ali Tamkin on the 10.6.1922, for a sum of Rs. 600/- only. Bhagwan Das's case now about this deed of gift is that it was a fictitious document and was never intended to be given effect to and that the deeds of gift and the various bonds which he purported to give remained all along in his possession and the donees never accepted them. This case of his has been accepted by the Court below though it has been strongly challenged by learned counsel in appeal.

[4] Though this deed of gift was executed on 10.9.1928, we find that Bhagwan Das filed a suit No. 7 of 1933, on 29.5.1933, on a mortgage

of 1.6.1921, for Rs. 4200 executed by Najmul Hasan and Badrul Hasan, defendants 1 and 2. In this case Bhagwan Das impleaded his sons and grandsons and alleged in Para. 3 of the plaint that they had no right, title and interest in the mortgage and were impleaded as pro forma defendants merely as a precautionary measure. The suit was decreed in favour of Bhagwan Das. He filed another suit as well, No. 8 of 1933, against certain other mortgagees. In Para. 4 he alleged that the deed of gift was fictitious and that his son, Prakash Chandra, who was impleaded as defendant No. 6 was being impleaded as a pro forma defendant and he had no interest in the deed. This suit too was decreed. The respondents have got printed a statement of Prakash Chandra admitting Para. 4 of the plaint, but learned counsel for the appellant has urged that this is not admissible in evidence. The document itself is not exhibited and we can find nothing on the record to show that it was ever proved. After having filed those two suits which were decreed in his favour, Bhagwan Das filed the present suit out of which this appeal has arisen on 29.5.1934, claiming to be entitled to the mortgage money, but in this suit he did not implead Gopi Saran, minor.

[5] During the pendency of this suit, however a suit was filed by Mt. Prem Dei widow of Babu Ram, claiming to be entitled to the money due on the other mortgage dated 10.6.1922, for Rs. 600 executed by Syed Ali Tamkin (Suit No. 310 of 1934). To this suit she impleaded Bhagwan Das and Gopi Saran and she claimed that she was entitled to the money. During the pendency of the suit, Mt. Prem Dei applied for a succession certificate and that application was opposed by Bhagwan Das on 29.9.1934. He alleged that the gift deed was fictitious and was never intended to transfer property to his minor sons, nor had it ever been acted upon. On the date of hearing, however, he did not appear and an ex parte order issuing a succession certificate in favour of Mst. Prem Dei was passed by the learned Munsif of Nagina on the 9.3.1935. Bhagwan Das has now given an explanation that the lady was entitled to maintenance and as the amount was only Rs. 600 he gave it to her by way of maintenance and did not, therefore, raise any further dispute.

[6] We have the conduct of the parties in connection with the previous suits and the evidence of Bhagwan Das and of Gopi Saran and a few other circumstances pointed out by learned counsel for the respondents on the basis of which to consider whether the deed of gift dated 10.9.1928, was or was not a genuine document intended to be acted upon. Learned counsel for



the respondents has pointed out that the original deed of gift was with the donor and he has produced the same. He has further urged that there was no overt act which would go to show that the deed of gift had ever been acted upon or that the debtors had ever been informed that the debts had been transferred to other persons to whom the amounts were to be paid. The original mortgage deeds on which the two suits were filed in the year 1933 and this suit in 1934 were in the possession of the plaintiff who filed the same. Besides the fact that there is this deed of gift and the fact that Mt. Prem Dei brought a suit relying on this gift and obtained a succession certificate, there is nothing else in favour of the defendant. It is impossible in these circumstances to hold that the judgment of the lower Court on this point is wrong. It is a very common attempt made by assesseees, who want to pay income-tax at a lower rate or to avoid payment of income-tax, to divide the property among the various members of the family. Gopi Saran has appeared as a witness in the case and has deposed that he had no interest in the mortgage. To the same effect is the statement of Bhagwan Das himself. It is not a case where for the purpose of this suit the father and the son may be said to have colluded to set up a false case. As early as 1933, Bhagwan Das had alleged that the deed of gift was fictitious and that position had been accepted by his sons and by his debtors. We, therefore, feel satisfied that the finding of the learned Judge, that the deed of gift was fictitious and was not acted upon is correct. On that finding, no question of its acceptance by the donee arises.

[7] Learned counsel for the appellant has taken as many as twelve grounds of appeal all of which relate, directly or indirectly, to the question whether the deed of gift was a genuine document and whether the plaintiff Bhagwan Das could, after the execution of the deed, bring a suit for realisation of the money due on the mortgage. Besides the twelve grounds raised in the grounds of appeal, learned counsel for the appellant wished to raise three other grounds by an application dated 9.4.1946. Those grounds are as follows:

13. Because the suit is barred by limitation.

14. Because the order of revival in suit No. 9 of 1934 was without jurisdiction and illegal.

15. Because the learned Civil Judge failed to strike proper issues arising out of the suit".

[8] Learned counsel for the appellant has admitted before us that grounds Nos. 13 and 14 may be treated as one and the same, his contention being that the learned Civil Judge had no jurisdiction to revive the suit after the expiry of the period of limitation. We feel most reluctant to

allow learned counsel to raise this plea. It is true that a plea of limitation was taken by the defendant in the written statement. He, however, did not press for an issue and we have, therefore, not had the benefit of a judgment on the point by the learned Civil Judge. If we were not satisfied that the suit could in no case be barred by limitation, we would have found it necessary to frame an issue and remit it to the Court below for proper decision: this suit was filed, as we have said, on 29.5.1934. The last payment made on behalf of the mortgagor, of interest as such was on 24.1.1926. It is not clear from the endorsement dated 5.11.1926 whether the last payment was towards interest or was a payment on account. In any case after the payment dated 24.1.1926 of Rs. 100. on account of interest the limitation for filing the suit was extended to 5.11.1938. (24.1.1938?) The present suit was filed well within limitation on 29.5.1934. It is true that Sayed Ali Yakin was a minor and no guardian was appointed of the minor and he was not shown as a minor in the array of parties in the plaint. The result, was that all proceedings taken against him so long as he was a minor, after the filing of the plaint, were not binding on Ali Yakin. The decree passed against him was a nullity and it could not be said that the suit had been disposed of as against Syed Ali Yakin. He attained majority on 26.8.1936 about two years prior to the expiry of the period of limitation and on the revival of the suit on the suit on 9.11.1940, it must be held that the suit remained pending all the time and therefore Syed Ali Yakin was properly impleaded as a party after 26.8.1936. No question of limitation can, therefore, arise under the circumstances.

[9] Learned counsel for the appellant has relied on a number of rulings of this Court and a decision of their Lordships of Judicial Committee. The first was the case in 31 ALL. 572<sup>1</sup>. In that case a proper guardian was not appointed of a minor and a decree was obtained against him and the property was sold. After the sale he filed a suit for a declaration that the decree and the execution sale and all the proceedings in the suit were invalid and were not binding on him as he was not properly represented. The question arose in that case whether a separate suit would lie by reason of section 244 of the Civil Procedure Code, now section 47 of the Code (Act V of 1908), and their Lordships of the Judicial Committee held that the minor had a right to file a suit as he was not properly represented in the suit and that the decree and other proceedings as against him must be held to be nullities and it could not be said that the minor was a party to the same. The same view



was followed in A. I. R. 1926 All. 387<sup>2</sup> and in A. I. R. 1940 ALL. 256.<sup>3</sup> There can be no doubt that a minor is not bound by any proceedings taken as against him where he is not properly represented and a guardian is not appointed of such a minor, but the question for decision in this case is not whether the minor was or was not properly represented—as it has always been held that he was not—but the question is whether it should be held that there was no suit filed against him on 29-5-1934, because no guardian had been appointed of the minor. In every suit where the defendant is a minor the right of appointing his guardian is not given to the plaintiff but to the Court. The plaintiff can only suggest who should be appointed his guardian and it is for the Court on being satisfied of the fact of the defendant's minority, to appoint a proper person to be guardian for the suit for such minor (O. 32, R. 3, C.P.C.). It is, therefore, obvious that the question of appointment of a guardian must come after the institution of the suit, but when a guardian is appointed the suit is not deemed to have been instituted against the minor on the date of such appointment but on the date when the suit was filed. If, before such appointment is or can be made, the minor attains majority, the suit would not be deemed to be filed against him on the date when he attained majority but on the original day when it was filed in Court. Even if we were to hold that it should be deemed to have been filed on the day when the defendant attained majority in the present case the suit must be deemed to have been filed within time as the defendant attained majority on 26-8-1936. In 52 ALL. 924<sup>4</sup> a minor was impleaded as a major and no guardian was appointed. An ex parte decree was obtained against him and later the decree was put in execution. It was in the executing Court that an objection was filed that the defendant had all along been a minor and had not been properly represented and the decree was, therefore, a nullity. This objection was allowed by the executing Court and then the plaintiff filed an application for the restoration of the suit to its original number and for its being proceeded with after the appointment of a guardian ad litem of Talib Ali Shah. The Court acceded to this request and the suit was tried on the merits. On an appeal being filed to this Court on behalf of the minor it was held that the minor must be deemed to have been a defendant to the suit from the very beginning, the only defect being that no proper guardian was appointed for him, and that the date of institution was the date when the suit was filed and not the date when the guardian ad litem was appointed. We respectfully agree with this decision and must hold that the suit must be deemed to have been filed on 29-5-1934, as

against Syed Ali Yakin though all subsequent proceedings against him were null and void as no proper guardian had been appointed.

[10] The reason why we are most reluctant to allowing the appellant to raise this plea of limitation at this stage when he did not insist on an issue on the point in the trial Court and made no grievance of it in his grounds of appeal is because we find that there were certain proceedings taken by some of the defendants under the Encumbered Estates Act. It appears that some of the legal representatives of Ali Tamkin filed an application or applications under the Encumbered Estates Act which remained pending for several years, and in an application dated 5-4-1941, (paper No. 94-C) the information is given to the Court that the Special Judge, II Grade, had dismissed the application under the Encumbered Estates Act. During the pendency of the proceedings under the Encumbered Estates Act, by reason of section 7 of that Act no fresh suit could be filed and any suit filed had to remain stayed. All that period has, therefore, to be excluded under S. 43, Encumbered Estates Act, in considering the period of limitation available for the suit.

[11] The only other point urged on behalf of the learned counsel for the appellant is that the mortgage deed is not proved according to law. This is a ground which was not taken in the grounds of appeal or even in the application dated 9-4-1946. Learned counsel has, however, urged with great force that unless we are satisfied that the mortgage deed was proved according to law we ought not to give the plaintiff a decree on the basis thereof. As we have already said, the Court below had framed only two issues and there was no issue as regards the execution or consideration of the mortgage-deed, though the learned Judge has, in dealing with issue No. 1 said as follows:

"The execution of the mortgage bond in suit was duly proved by Sheo Nath Singh attesting witness and passing of consideration is proved by Bhagwan Das as also from the documents, Exhibits I and II."

[12] We must say that this case was tried in a very perfunctory manner by the learned Civil Judge. We looked at the back of the original mortgage deed and we could not find any admission or denial on behalf of the appellant, Ali Yakin. It is true that the suit had once been decreed ex parte and the other legal heirs of Ali Tamkin had submitted to the decree, but yet as against Ali Yakin the suit had to be tried according to law. In the written statement, the defendant had no doubt taken a plea which, though not very clearly worded, may be taken to be a specific denial of the execution of the mortgage deed. It is true that it does not appear that the defendant ever pressed for an issue on the point. He did not



make a grievance of this fact even in the grounds of appeal filed by him in this Court, though he had taken as many as twelve grounds of appeal. Three years after the filing of the appeal when the case was actually listed for hearing learned counsel for the appellant filed an application already mentioned by us above on 9-4-1946, and even in this application no such ground was taken.

[13] On the evidence on the record, however, it is urged by learned counsel for the respondent that even if it was necessary to prove the mortgage deed, the mortgage deed was proved according to law. That Bhagwan Das plaintiff went into the witness-box and stated that Ali Tamkin had borrowed Rs. 5000 from him and had executed and signed the mortgage bond which was Ex. 1 in suit. It does not appear, however, from the Judge's notes of the evidence of Sheo Nath, attesting witness, whether his attention was at all drawn to the mortgage deed. We have now a single record system which means that the Judge takes short notes of the evidence in English while the witness is giving his evidence in the vernacular. The notes of evidence recorded by the learned Judge are neither as full nor as complete as we would expect them to be. The fact, however, remains that there was neither any clear issue on the point nor was there any ground of appeal clearly taken in this Court.

[14] Learned counsel for the respondents has relied on the case in 12 A. L. J. 1114<sup>5</sup> and has urged that there was sufficient compliance with the requirements of S. 68, Evidence Act. It is not necessary for us at this stage to go into this question as we feel that it would be proper if a clear issue is framed on the point and the lower Court is asked to record a finding on the same. Before, however, we finally dispose of this case, we direct that the lower Court may remit a finding to this Court on the issue whether the mortgage deed in suit was executed by Ali Tamkin and was duly attested by the attesting witnesses. The parties would be entitled to produce fresh evidence. The finding is to be remitted within three months from this date and ten days time will be allowed to the parties to file objections on receipt of the finding.

[On receipt of the finding, their Lordships held that the mortgage-deed in suit was proved according to law. They, therefore, dismissed the appeal with costs.]

V.B.B.

*Appeal dismissed.*

A. I. R. (34) 1947 Allahabad 361 [C. N. 136.]

FULL BENCH

MULLA, MALIK AND MOOTHAM JJ.

*Bal Krishna Maheshwari — Applicant v. Uma Shanker Mehrotra and another — Opposite Party.*

Civil Revn. No. 278 of 1946, Decided on 5-3-1947, against order of Dist. Judge, Cawnpore, D/- 26-4-1946.

\* (a) Companies Act (1913), Ss. 79 and 76—Jurisdiction of Court under S. 79 — Question of impracticability of calling meeting has to be decided primarily with reference to Articles of Association — Scope of S. 76.

Where the annual general meeting of a company was not held within the time limit prescribed by the Articles of Association of the Company :

*Held* that the calling of such meeting had become "impracticable" within the meaning of S. 79 (3) although the time limit mentioned in S. 76 (1) had not expired.

In coming to this conclusion the Court held as follows:

1. The question of impracticability or otherwise of calling a meeting within S. 79 (3) must be decided primarily in the light of the Articles of Association of the Company unless such Articles contravened any mandatory provisions of the Act or there were no relevant Articles of Association governing the matter.

2. The Article prescribing a time limit in this case which expired before the time limit mentioned in S. 76 (1) did not contravene the provisions of that section and so was binding in the matter.

3. The fact that a meeting might have been held with the consent of all the members after the time limit under the Articles of Association and before the expiry of the time under S. 71 (1) did not affect the question as to the practicability of calling the annual general meeting for the purpose of S. 79 (3).

*Held further* that the jurisdiction of the Court under S. 79 (3) was rightly invoked by the President of the Council (U. P. Merchants' Chamber) in charge of the management of the affairs of the Company. [Para 3]

(b) Companies Act (1913), S. 79 (3) — Court, if can decide validity of meeting.

The District Court empowered under S. 3 (1), Companies Act by virtue of notification by Central Government possesses unlimited jurisdiction for trying civil suits when acting as a civil Court and there is no justification in law for placing any fetters upon it when acting in the exercise of its jurisdiction under S. 79 (3).

Where, therefore upon the jurisdiction of the Court under S. 79 (3) being invoked by a party, a question is raised as to the validity or otherwise of a meeting, the Court has jurisdiction to determine that question.

The fact that the law does not provide for any appeal from an order passed in the exercise of that jurisdiction and also the fact that it is always open to a party to move the civil Court for the determination of the validity or otherwise of a meeting, are not considerations justifying limiting the jurisdiction. [Para 5]

*Sir Tej Bahadur Sapru, P. L. Banerji, Mushtaq Ahmed, Sambhu Prasad, S. N. Katju and Jalaluddin Ahmad*—for Applicant.

*Sir Alladi Krishnaswami Aiyar, G. S. Pathak, R. N. Gurtu, P. N. Haksar, R. K. Khanna and A. Hoon*—for Opposite Party.

**Mootham J.**—This is reference to a Full Bench which arises out of a petition in revision under S. 115, Civil P. C., presented by



one Bal Krishna Maheshwari, a member of the Merchants' Chamber of U. P. which is a Company limited by guarantee duly incorporated and registered under S. 26, Companies Act (7 [VII] of 1913). The petitioner challenged the validity of an order passed by the learned District Judge of Cawnpore on 26-4-1946, confirming a previous *ex parte* order passed by him on 28-3-1946, directing the calling of the annual general meeting of the Company on 27-4-1946. The challenge was made on the ground that the said order of the learned District Judge of Cawnpore was beyond his jurisdiction and on that basis the petitioner claimed the relief that the said order and the annual general meeting of the Company held in pursuance thereof should be declared to be null and void. The matter came up for consideration before a Bench of this Court and from the argument addressed by the parties two questions having an important bearing on the administration of the Company law arose for determination. In view of the importance of those questions, and the fact that they were not covered by any precedent of this Court or of any other High Court the Bench seized of the matter made the present reference with the object of having those questions fully considered and finally decided by an authoritative pronouncement of this Court.

[2] The material facts of the case and the points raised in the course of the argument have been set out at great length in the order of reference made by the Bench and we think it would be an obvious waste of time and labour to cover the whole ground again in the present judgment. As already stated, there are but two points of law which arise for consideration and we consider it necessary to state a few facts in order to bring out those points. Article 46 of the Articles of Association of the Company provides that an annual general meeting of the Company shall be held in every calendar year before the 31st of March. The dispute in the present case relates to the annual general meeting of the Company for the year 1946. It is an admitted fact that the last preceding annual general meeting of the Company had taken place on 3-2-1945. According to the Article of Association of the company referred to above, the annual general meeting of the Company for the year 1946 had to be called on some date before 31st March in that year. The management of the affairs of the Company lies in the hands of a Council of twenty-one members, including a President and a Vice-President, and the duty of calling the annual general meeting of the Company in every calendar year falls upon that Council. On behalf of the petitioner it is alleged that in accordance with the

Articles of Association of the Company a clear fourteen days' notice for the annual general meeting in 1946 was issued and posted in due course on 13-3-1946, fixing 28-3-1946, as the date of the meeting. It is contended on the other side that though a notice was directed to be issued fixing that date, yet, in fact, no notice was issued and posted to any member of the Company until 15-3-1946, so that there could be no clear fourteen days' notice of the meeting as required by Art. 49 of the Company's Articles of Association. It is further alleged that a member of the Company, who received a notice of the meeting to be held on 28-3-1946, actually raised an objection that the notice was invalid and sent a written communication to that effect to the President of the Council who thereupon proceeded to cancel the meeting on 25-3-1946, and on 28th March made an application to the learned District Judge, Cawnpore, invoking his jurisdiction under S. 79 (3), Companies Act to call the annual general meeting. The two points of law which have to be determined in the present case turn upon the true interpretation of S. 79 (3), Companies Act and it is, therefore, necessary to set out its terms in extenso. The section runs as follows:

"If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called or to conduct the meeting of the company in manner prescribed by the articles or this Act, the Court may, either of its own motion or on the application of any director of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is given may give such ancillary or consequential directions as it thinks expedient, and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted."

For the purposes of appreciating the points raised before us in the argument on behalf of the petitioner it is necessary also to set out here the terms of S. 76, Companies Act, which runs as follows :

"76. (1) A general meeting of every company shall be held within eighteen months from the date of its incorporation and thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting.

(2) If default is made in holding a meeting in accordance with the provisions of this section, the company and every director or manager of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees.

(3) If default is made as aforesaid, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company."

We may also mention here that the learned District Judge has found as a fact upon the evidence produced before him by the parties



that though a meeting of some sort was held on 28-3-1946, yet the notice calling a meeting on that date was not actually issued and posted until 15th or 16th March 1946, so that it did not leave a clear margin of fourteen days before 28-3-1946. Having arrived at that finding, the learned District Judge proceeded to hold that the meeting of some sort which had taken place on 28-3-1946, was not a valid meeting in the eye of the law and had consequently to be disregarded altogether. He thus arrived at the conclusion that the calling of a valid meeting in the manner prescribed by the Company's Articles of Association had become impracticable and he consequently proceeded on 26-4-1946, to confirm his previous *ex parte* order of 28-3-1946, calling a general meeting of the Company on 27-4-1946. The petition before us challenges the validity of this order and consequently of the meeting held in pursuance thereof on the ground that it was beyond the jurisdiction of the learned District Judge.

[3] It is not permissible in revision to go behind the finding of fact recorded by the learned District Judge and the argument before us has, therefore, proceeded on the assumption that though a meeting of some sort was held on 28-3-1946, yet there was no clear fourteen days' notice for that meeting as required by the Company's Articles of Association. In view of the clear language of S. 79 (3), it is evident that there is a condition precedent to the exercise of the jurisdiction conferred by it and that is that it must be found that for some reason it has become impracticable to call a meeting of a company in any manner in which meetings of that company may be called. So far there is and can be no contest. On behalf of the petitioner, the challenge against the jurisdiction of the learned District Judge is sought to be supported on two grounds and they give rise to the two points of law which we have to determine. The first ground is that the question of the impracticability or otherwise of calling an annual general meeting must be decided not only in the light of the Company's Articles of Association, but also of the general provision contained in S. 76 (1), which has been cited above. It is contended on that basis that in the circumstances of the present case, the calling of the annual general meeting of the Company had not become impracticable, inasmuch as though the time limit prescribed by the Company's Articles of Association had expired, yet the wider limit laid down by S. 76 (1), was still available and having regard to the fact that the last preceding annual general meeting had taken place on 3-2-1945, the annual general meeting for the year 1946 could validly be called at

any time before 3-5-1946. It has been very strenuously argued on behalf of the petitioner that in the present case a conflict had arisen between the general provision contained in S. 76 (1) and the Articles of Association of the Company and the former must prevail over the latter. In support of his argument, learned counsel for the petitioner further contended that in S. 79 (3) the phrase "in manner prescribed by the articles or this Act" must be applied to both the clauses that precede it and it must, therefore, be held that the impracticability or otherwise of calling a meeting has to be determined not only by reference to the Articles of Association of a Company, but also to the general provisions of the Act. Upon a careful analysis of the language of S. 79 (3) and of the general provision contained in S. 76, we are unable to accept this contention. In our judgment, there are two distinct and separate clauses which precede the phrase "in manner prescribed by the articles or this Act" in S. 79 (3) and it follows, therefore, that upon a plain grammatical construction of the language of the section the phrase is applicable only to the clause which immediately precedes it. Section 79 (3) provides for two separate matters : firstly, the impracticability of calling a meeting of a company in any manner in which meetings of that Company may be called and secondly, conducting the meeting of the company "in manner prescribed by the articles or this Act." It is worthy of note that the words "in any manner" occur in cl. 1 and upon the reading suggested by the learned counsel for the petitioner the words "in manner" have to be repeated if the phrase "in manner prescribed by the articles or this Act" is applied to both the clauses that precede it. Upon a plain reading of the language of the section, we are of the opinion that the question of the impracticability or otherwise of calling a meeting has to be decided primarily in the light of the company's Articles of Association. We may here point out that the words "that company" in cl. 1, are very significant. They clearly show that the clause refers to a particular company and not to all companies; whereas the provision contained in S. 76 (1) applies to every company. It has, however, to be borne in mind that there may be cases in which the Articles of Association either fail to make any provision for a matter which is governed by the general provisions of the Act or make a provision which is in direct conflict with some mandatory provision of the Act applicable to all companies. In the former case it would obviously be necessary to refer to the Act when deciding the question of the impracticability or otherwise of calling a meeting. In the latter case, the mandatory provision of the Act



will prevail and the provision contained in the Articles of Association will have to be disregarded. Apart from these exceptional cases, the question of the impracticability or otherwise of calling a meeting must be decided only by reference to the company's Articles of Association. We find further that in the circumstances of the case before us no conflict could really arise between the general provision contained in S. 76 and the Company's Articles of Association. Section 76 in sub-s. (1) lays down two mandatory provisions of general application to all companies relating to the calling of the annual general meeting, firstly, that the meeting shall be held once at least in every calendar year and secondly, that it shall be held not more than fifteen months after the holding of the last preceding general meeting. This sub-section does not prohibit any company from prescribing any time limit for the holding of its annual general meeting so long as the two mandatory conditions mentioned above are fulfilled. In the case before us, the Company laid down in Art. 46 of its Articles of Association that there shall be an annual general meeting of the Chamber which shall be held before the 31st of March, at such time and place, as the Council for the time being may determine." This provision did not contravene any one of the two conditions prescribed by S. 76 (1) and hence no question of any conflict between S. 76 (1), and the Company's Articles of Association arises at all. In prescribing a time limit for the holding of its annual general meeting in each calendar year the Company did not infringe any provision of the Companies Act. It is not one of the exceptional cases referred to above, and it follows, therefore, that the question of the impracticability of calling the annual general meeting in 1946 had to be determined only by reference to the Company's Articles of Association. The argument on behalf of the petitioner proceeds on the assumption that S. 76 enables the calling of an annual general meeting at any time after the expiry of the time limit fixed by a Company's Articles of Association and before the expiry of the wider time limit given by S. 76 (1). Upon a plain reading of the language of S. 76, we find that this assumption is not correct. An annual general meeting of a company may be called under sub-s. (3) of S. 76, on the application of any of its members, but the condition precedent is that a default must have taken place in holding the general meeting in accordance with the provisions of the section. It follows, therefore, that S. 76 can never operate for the purposes of calling an annual general meeting at any time within the limit prescribed by sub-s. (1). From this again it is clear that in

the present case there could be no conflict between S. 76 on the one hand and the Company's Articles of Association on the other. Learned counsel for the petitioner contended that if the Directors of the Company had called and held the annual general meeting at any time after 31-3-1946, and before 3-5-1946, the validity of such a meeting could not possibly be challenged in view of S. 76 (1). It may have been possible for the Directors of the Company to call and hold such a meeting and that meeting may have been valid, but it could not be a meeting called and held either in accordance with the Company's Articles of Association or the provisions of S. 76. The meeting could be called and held with the consent of all the members, but the possibility of such a meeting being called and held cannot be taken into account for the purpose of deciding the question whether the calling of the annual general meeting had or had not become impracticable on the date on which the jurisdiction of the learned District Judge under S. 79 (3) was invoked. We are, therefore, of the opinion that the general provisions contained in S. 76 of the Act, have no application to the period intervening between the time limit for calling and holding and annual general meeting fixed by a Company's Articles of Association and the wider time limit for calling and holding such a meeting prescribed by S. 76 (1). At any time before the expiry of the wider limit prescribed by S. 76 (1) the jurisdiction conferred upon the Court by S. 79 (3) comes into operation and it can be invoked by a director or a member of any company for calling the annual general meeting. We find further that the jurisdiction of the learned District Judge was rightly invoked in the present case by the President of the Council in charge of the management of the Company's affairs.

[4] The second ground on which the jurisdiction of the learned District Judge has been assailed is that S. 79 (3) is only a procedural provision which does not confer any judicial power on the District Judge to enter into and decide the question of the validity or otherwise of a meeting alleged to have been held. It is contended that where the jurisdiction of the Court is invoked under S. 79 (3) of the Act, for the purpose of calling a meeting and an objection is raised that a meeting has in fact already been called and held, all that lies in the power of the Court to do in the exercise of its jurisdiction is to decide the question of fact and if it finds that the fact of a meeting having been held has been established, it must immediately stay its hand and has no jurisdiction to proceed further to decide whether the meeting was valid or invalid. It was



strenuously argued that as soon as the issue of the validity or otherwise of a meeting is raised, the Court acting under S. 79 (3) of the Act, must declare that it has no jurisdiction to proceed any further and must leave the parties to pursue their remedy in the civil Court. At one stage of the argument, learned counsel for the petitioner tried to maintain that the Court acting under S. 79 (3), ceased to have any jurisdiction as soon as an objection was raised before it that a meeting has actually been held. The claim that the jurisdiction of a Court can be ousted merely by an allegation is obviously extravagant and it was not, therefore, pressed, but the learned counsel laid great emphasis on the fact that an order passed by the Court in the exercise of its jurisdiction under S. 79 (3) of the Act, is not open to any appeal even though the order might affect valuable rights and, on this ground, we were asked to infer that the law could not possibly have intended to confer upon the Court the jurisdiction to determine the validity or otherwise of a meeting. In our judgment, the position taken on behalf of the petitioner is untenable. It is conceded that there are no express words in the statute which place the suggested limit on the jurisdiction of the Court under S. 79 (3), but it is contended that the lack of jurisdiction to decide the question of the validity or otherwise of a meeting must necessarily be inferred from the fact that no appeal has been provided from an order made by the Court in the exercise of its jurisdiction under that section. In dealing with this question, we must first of all point out that all jurisdiction under the Companies Act has been conferred by S. 3 (1), in the first instance upon "the High Court having jurisdiction in the place at which the registered office of the company is situate." We do not think that it can be argued with any force or reason that the High Court has no jurisdiction to enter into and decide the question of the validity or otherwise of a meeting. There is further provision in the same section "that the Central Government may, by notification in the official gazette and subject to such restrictions and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction by this Act, conferred upon the Court, and in that case such District Court shall, as regards the jurisdiction so conferred, be the Court in respect of all companies having their registered offices in the district." The District Judge at Cawnpore exercises jurisdiction under the Companies Act in accordance with this provision and it has not been suggested that the Central Government has placed any restrictions upon his jurisdiction. It follows, therefore, that the District Judge at Cawnpore possesses the same jurisdiction which

has been conferred upon the High Court by S. 3 (1) of the Act. Now, when the Court empowered under S. 3 (1) proceeds to exercise the jurisdiction conferred upon it by S. 79 (3), the very first question which it has to decide is whether the calling of a meeting has become impracticable. It is open to any party to challenge the exercise of that jurisdiction and for that purpose it may be alleged as in the present case that a meeting has actually been called and held and hence the basic condition on which the Court can proceed to exercise its jurisdiction for calling a meeting does not exist at all. Such an allegation must necessarily amount to assertion that the meeting alleged to have been held fulfils all the requirements of the law. No objector can be allowed to ask the Court to stay its hand merely with the allegation that a meeting has in fact been called and held, though it was not a valid meeting. When such an allegation is made, the issue which immediately arises for decision is: Has a valid meeting been in fact called and held? The Court must proceed to find not only whether a meeting of some sort has been held but that the said meeting fulfilled the requirements of the law before it can refuse to exercise its jurisdiction. The Court may find that a meeting of say nine persons was held, though the quorum required by the law was ten and the question is whether upon such a finding the Court must stay its hand and declare that it has no further jurisdiction in the matter. In our judgment, the answer is obviously in the negative. The Court cannot shut its eyes to the fact that the meeting actually held was not a meeting in the eye of the law and if it takes that fact into account, it must proceed to hold that the calling of a meeting has become impracticable provided that the time limit fixed for the calling of such a meeting by the Company's Articles of Association has expired or the calling of the meeting within that time limit in the manner prescribed by the Articles of Association has become impossible. We see no reason at all why such an issue should not be determined by the Court. There is nothing in the language of S. 79 (3) upon which the contention of the learned counsel for the petitioner can be founded. It was strenuously contended by learned counsel that the determination of such an issue might often involve the decision of complicated questions of fact and law and it must, therefore, be inferred that the law did not contemplate the determination of such a question in a miscellaneous proceeding under S. 79 (3). We are not impressed at all by this argument because we do not think that in the large majority of cases any complicated questions of law and fact will arise for consideration.



[5] The question of the validity or otherwise of a meeting will, in a vast majority of cases, turn upon the interpretation of the Company's Articles of Association and some general provisions of the law. We see no reason for holding that the Court acting under S. 79 (3) is for any reason less competent to try and decide such questions than the civil Court to which learned counsel for the petitioner seems to attach a peculiar sanctity. It has to be borne in mind that the District Court empowered under S. 3 (1), Companies Act, possesses unlimited jurisdiction for trying civil suits when acting as a civil Court and we see no justification in law for placing any fetters upon it when acting in the exercise of its jurisdiction under S. 79 (3). Nor are we impressed by the argument that the law could not have intended to afford such a wide jurisdiction upon the Court acting under S. 79 (3) because it did not provide for any appeal from an order passed in the exercise of that jurisdiction and also because it is always open to a party to move the civil Court for the determination of the validity or otherwise of a meeting. These considerations do not, in our judgment, justify the contention that the jurisdiction of the Court under S. 79 (3) must be of a very limited character. We may also point out that it may be said on the other hand, and perhaps with greater reason, that the law might well have presumed that the members of a company would be anxious to prevent the normal running of their business from being brought to a standstill by protracted litigation in the civil Court and to have any disputes calculated to interfere with that business speedily settled by resorting to the Court upon which jurisdiction has especially been conferred under the Companies Act. It may be open to any party to seek relief from the civil Court, but that is no reason for holding that the jurisdiction of the Court especially empowered to deal with company matters is in any respect fettered or limited. We, therefore, hold that where upon the jurisdiction of the Court under S. 79 (3) being invoked by a party a question is raised as to the validity or otherwise of a meeting, the Court has jurisdiction to determine that question. It follows, therefore, that the order passed by the learned District Judge at Cawnpore on 26-4-1946, confirming the previous ex parte order passed by him on 28-3-1946, in pursuance of which the annual general meeting of the company was called and held on 27-4-1946, was entirely within his jurisdiction and the petitioner is not entitled to any relief. The petition in revision is accordingly dismissed with costs.

R.G.D.

*Revision dismissed.***A. I. R. (34) 1947 Allahabad 366 [C.N. 137.]**

MULLA J.

*Chhote v. Emperor.*

Criminal Revn. No. 1673 and Cri. Ref. No. 1580 of 1946, Decided on 8-4-1947, from order of Sessions Judge, Muzaffarnagar, D/- 30-7-1946.

Criminal P. C. (1898), S. 414 — Offence under R. 81 (4), Defence of India Rules—Order imposing fine and directing forfeiture—Order whether appealable.

Where in a summary trial for an offence under R. 81 (4), Defence of India Rules, an order imposing a fine of Rs. 100 and an order of forfeiture of property worth more than Rs. 1000 is passed, the order of forfeiture is not a part of the sentence of fine. The case is, therefore, outside the ambit of S. 414, which being a provision of a restrictive character, must be strictly construed as far as possible in favour of the subject as against the Crown. Hence the right of appeal against the sentence is not barred by S. 414. [Paras 4 & 5]

('46-Com.) Cr. P. C., S. 414 N. 4.

*J. S. Gupta* — for Applicant.

*Deputy Government Advocate* — for the Crown.

**Order.**—This is an application in revision by one Chotte who has been convicted by a First Class Magistrate in a summary trial of an offence under Rule 81 (4) of the Defence of India Rules for having contravened certain provisions of an order made by the District Magistrate of Muzaffarnagar on 8th September 1945, relating to Khandsari sugar. The prosecution case was that the applicant had contravened the following four provisions of the said order of the District Magistrate:

"(2) That every dealer, manufacturer and any person dealing otherwise in Khandsari sugar shall get himself registered in the Supply Office, Muzaffarnagar, within one month from the date of this order. . . . (4) That every person registered under Clause 2 shall submit a monthly return in the following form to the District Supply officer which should reach his office not later than the 3rd of the succeeding month. (5) That every registered Khandsari dealer, manufacturer or person dealing otherwise shall maintain a stock register in the form given below up to date with correct entries. (6) That every registered Khandsari dealer shall maintain a daily register in the following form with up-to-date correct entries."

The trial being summary, the only record available in the case is the judgment of the learned trying Magistrate and it is from that judgment that I have gathered the fact that the applicant was charged with having contravened the above-mentioned four provisions of the District Magistrate's order, dated 8th September 1945. Now, a moment's consideration will show that the prosecution was a contradiction in terms inasmuch as if the applicant was a person who had not got himself registered in the Supply Office, Muzaffarnagar, as required by provision No. (2) cited above, then the 4th provision referred to above could not possibly apply to him because it is applicable only to a "person registered under clause (2)." The language of the other two provisions is not quite clear but they



seem also to be applicable only to registered Khandsari dealers or manufacturers, for it is obvious that no rule could be made applicable to a person who had not been registered and had not obtained a licence.

[2] At the request of the Crown Prosecutor the learned Magistrate held a summary trial and the defence raised by the applicant was that he had already applied for a licence and had been told by the Supply Department that he would soon get it by post. He further alleged that he had manufactured sugar for the purposes of private consumption on the occasion of marriage in his family. The prosecution proved by oral evidence that the applicant's house was raided on 24th March 1946, by a police officer with the result that the following articles were recovered: (1) 24 maunds of ready made Khandsari sugar, (2) 10 maunds sugar in Adda, (3) 18 maunds Rab, (4) 48 jars of Rab and 32 maunds of Sheera including other accessories. The applicant was convicted and the learned trying Magistrate imposed upon him a fine of Rs. 100 and it was further ordered that all the items of property referred to above shall be forfeited to the Crown and their sale proceeds shall be deposited in the treasury.

[3] From this conviction, the applicant appealed to the learned Additional Sessions Judge of Meerut at Muzaffarnagar. At the hearing of the appeal it was urged on behalf of the Crown that the appeal was incompetent under S. 414, Cr. P. C. The learned Additional Sessions Judge came to the conclusion that the contention was sound and he, therefore, allowed it to prevail with the result that the applicant's appeal was summarily dismissed. It appears that the applicant then put in a petition in revision upon which the learned Additional Sessions Judge has made a reference to this Court recommending for various reasons given by him that the conviction and sentence of the applicant be set aside. The reference has naturally been connected with the application in revision.

[4] It is obvious that it would not be necessary for me to pass any order upon the reference made by the Additional Sessions Judge if it is found that the application in revision is well founded and must prevail. I have considered that application very carefully and have heard learned counsel for the Crown and I find that the learned Additional Sessions Judge has erred in law in holding that the appeal made to him by the applicant from his conviction in the summary trial held by a First Class Magistrate was not competent in view of S. 414, Cr. P. C. Section 414, Criminal P. C. runs as follows:

"Notwithstanding anything hereinbefore contained there shall be no appeal by a convicted person in any

case tried summarily in which a Magistrate empowered to act under S. 260 passes a sentence of fine not exceeding two hundred rupees only."

It may be noted here that a general right of appeal is given by S. 408, Cr. P. C. to any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the First Class. Now S. 414 places some restrictions on that general right. Being a provision of a restrictive character, it must be strictly construed as far as possible in favour of the subject as against the Crown. The bar laid down in S. 414 must be applied only to a case which comes clearly within its four corners, that is, to a case in which a Magistrate empowered to act under S. 260 passes a sentence of fine not exceeding two hundred rupees only. Any case in which a Magistrate empowered to act under S. 260 passes a sentence which is not merely one of fine not exceeding two hundred rupees only but also a sentence of some other character, the bar laid down by S. 414, Cr. P. C. cannot apply. The simple question in the present case, therefore, is whether the order of forfeiture of property passed by the trying Magistrate is or is not a part of the sentence imposed upon the applicant. It may be pointed out here that the property confiscated in the present case was much more than Rs. 1,000 in value and under S. 32, Cr. P. C. a Magistrate of the First Class cannot impose a fine exceeding one thousand rupees. The order of forfeiture, however, is justified by Rule 81 (4) of the Defence of India Rules which runs as follows :

"If any person contravenes any order made under this Rule, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both, and if the order so provides any Court trying such contravention may direct that any property in respect of which the Court is satisfied that the Order has been contravened shall be forfeited to His Majesty." Now, we find that the order of the District Magistrate of Muzaffarnagar dated 8.9.1945, contained the following provision at the end:

"Any person contravening any of the provisions of this order shall be liable to punishment under sub-r. (4) of R. 81, Defence of India Rules with imprisonment for a term which may extend to 3 years or with fine or with both and without prejudice to any other punishments to which he may be liable, any Court trying the offence shall order that the material together with its packages, if any, in respect of which the Court is satisfied that the offence has been committed be forfeited to His Majesty unless for reasons to be recorded in writing the Court is of opinion that the direction should not be made in respect of the whole or a part of the property."

[5] It is clear that the order made by the District Magistrate prescribes forfeiture as one of the modes of punishment and the same conclusion is clearly deducible from the language of R. 81 (4), Defence of India Rules. It must, therefore, be held that in the present case the



trying Magistrate has imposed upon the applicant not merely a fine of Rs. 100 but a further punishment of forfeiture of certain property belonging to him. The case is, therefore, outside the ambit of S. 414, Criminal P. C. and I think it would be wrong in these circumstances to hold that the applicant had no right of appeal.

[6] The result, therefore, is that I allow the application in revision made by Chhota and direct that the appeal filed by him in the Court of the Additional Sessions Judge at Muzaffarnagar shall be heard and disposed of in accordance with the law. It is not necessary for me to pass any order upon the reference made by the learned Additional Sessions Judge, for it would be open to the learned Judge himself upon hearing the appeal to pass any order demanded by law and justice.

V.B.B.

*Petition allowed.*

### A. I. R. (34) 1947 Allahabad 368 [C.N. 138.]

SINHA J.

*Ram Saran — Plaintiff — Appellant v Khushi Ram and another — Defendants — Respondents.*

Second Appeal No. 600 of 1944, Decided on 13-3-1947, from decision of Civil Judge, Muttra, D/- 1-4-1943.

Hindu Law — Alienation — Powers of Hindu widow—Legal necessity—Prudent course of management—Alienation for discharging mortgage.

The powers of alienation which the Hindu Law confers upon a widow are restricted. The pressure on the estate, the danger to be averted, the benefit to be conferred, these and such like are the heads of legal necessity. An alienation by her is also justified on the ground of prudent course of management : 7 A. I. R. 1920 All. 345, *Ref.* [Para 10]

There is no pressure on the estate and no danger to be averted where the mortgage for the discharge of which the alienation is effected is one with possession: 10 A. I. R. 1923 All. 535, *Rel. on.* [Para 12]

Nor can it be said that the alienation is dictated by a prudent course of management where a slight care on the widow's part would have enabled her not only to redeem the mortgage but to save a substantial portion of the property. [Para 10]

*Cases referred:—*

1. ('20) 1920-18 A. L. J. 41 : 7 A. I. R. 1920 All. 345: 42 All. 109 : 59 I. C. 162, *Pahalwan Singh v. Jiwan Das.*
2. ('23) 1923-21 A. L. J. 354 : 10 A. I. R. 1923 All. 535 : 73 I. C. 1010, *Bandhu Ram v. Ram Kisbun Sonar.*

*K. C. Mital — for Appellant.*

*M. L. Chaturvedi — for Respondents.*

**Judgment.**— This is a plaintiff's appeal and arises out of a suit for a declaration that the sale of 6.9.1940, granted by one Mt. Jhunia in favour of Khushi Ram, is not binding on him. Mt. Jhunia, who was alive on the date

of the suit, was the widow of one Gokul. The plaintiff claims to be Gokul's reversioner.

[2] The plaintiff came to Court on the allegation that the sale was not justified by legal necessity and that the lady, who was an old lady, executed the document without really understanding it. The defence, in the main, was that the plaintiff was not the reversioner, the transaction was justified by legal necessity and the lady executed the sale deed after fully understanding it.

[3] The learned Munsif in a judgment, marked by care and ability, found that the plaintiff had succeeded in proving that he was the reversioner of Gokul. He found that part of the consideration mentioned in the sale deed was fictitious and as for the other part, he found that there was no legal necessity for it. In the result, he decreed the plaintiff's suit. On appeal, the learned Civil Judge in a judgment which hardly redounds to his credit, agreed with the learned Munsif in his finding that the plaintiff had succeeded in proving the pedigree. He also agreed with him that part of the consideration was fictitious. He disagreed with him with regard to the rest and found that it was justified by legal necessity. In the result, he dismissed the suit. The plaintiff has come to this Court in second appeal.

[4] The facts appear to be briefly these: Mt. Jhunia was the widow of one Gokul who had a brother, Bhagwant. The sale deed in dispute was executed by the lady for Rs. 1500. Its ostensible consideration was as below:

(1) Rupees 375 for payment to Kanhaiya Lal's promissory note Ex. C dated 11-4-1932 for Rs. 200; (2) Rs. 225 for payment of Radha Raman's promissory note Ex. F dated 12-8-1933 for Rs. 125; (3) Rs. 500 for payment to the mortgagees Mt. Bhabuti, Ganga Shyam, Moola, Mt. Sundari, Mt. Chironji and Radha Lal, without specifying whether the amount was payable under one, two or more mortgage deeds and without giving any further details about the mortgage or mortgages; (4) Rs. 350 paid in cash and (5) Rs. 30 paid for costs of stamp and registration: Total : Rs. 1500.

[5] The Courts below are agreed that the two promissory notes were fictitious. They have differed with regard to the 3rd and 4th items—Rs. 500 for payment to the mortgagees and Rs. 350 paid in cash. The controversy before me has centred round these two items.

[6] The history of the transaction dates back to the years 1879 and 1881. On 5-7-1879, Gokul the husband of the lady, and his brother, Bhagwant executed a usufructuary mortgage in favour of Badle, Nand Kishore and Mt. Juglo. Bhagwant died issueless and on 16th April, Mt. Jhunia renewed the mortgage. The second mort-



gage was executed on 20-7-1881, by Gokul in favour of Mani Ram. This mortgage was renewed by Mt. Jhunia on 13-8-1908, in favour of a number of persons. It is for the discharge of these mortgages that a sum of Rs. 500/- was left in the hands of the vendee, but, curiously enough, the recital is lacking in very important particulars. The names of the mortgagors are not mentioned, nor is the amount due to them, nor are the dates or years, when they were executed, mentioned. It is also not clear whether the mortgages sought to be redeemed, were one or more than one.

[7] The learned Munsif found that the old mortgages still remain unredeemed and the sale was made, not for the purpose of redeeming the mortgages, but for the so-called purpose of paying off the fictitious promissory notes, executed in favour of Radha Raman and Kanhaiya Lal, uncle and nephew. Indeed, he found that Radha Raman, Kanhaiya Lal, Ram Hari, a nephew of the lady, and the vendee, Khushi Ram, had entered into a sort of a conspiracy to defraud the lady and the object of the transaction was not the discharge of the prior debts. The fourth item is a sum of Rs. 350/- alleged to have been paid in cash before the Sub-Registrar. The learned Munsif found that, out of this sum, a sum of Rs. 325/- went to Ram Hari and Rs. 25/- or 30/- remained with the lady for the ostensible purpose of her maintenance.

[8] The learned Civil Judge, on the other hand, found that although according to the recital in the sale deed, the sum of Rs. 500/- was left in the hands of the vendee, nevertheless, the sum due on the earlier mortgage was Rs. 745/- He, however, found, that on the date of the suit the mortgages had not been redeemed.

[9] As regards the sum of Rs. 350/- the learned Civil Judge found that Rs. 120/- out of it went to Ram Hari on account of the debt to him from the lady, and the balance of Rs. 200/- was deposited with him to defray her future maintenance.

[10] Before addressing myself to the legal position created by the earlier mortgages for the discharge of which the sum of Rs. 500/- was left in the hands of the vendee, I propose to deal with the sum of Rs. 350/- (cash) which passed before the Sub-Registrar. The learned counsel for the respondent had to concede that he cannot place before me any authority which affords an even remote parallel to the case before me. It is too late in the day to challenge the proposition that the powers of alienation, which the law confers upon a Hindu widow, are restricted. The pressure on the estate, the danger to be averted, the benefit to be conferred, these and such like, are the heads of legal necessity. There is another class of cases which has introduced

yet another head and this had slightly enlarged her powers by justifying the alienation on the ground of prudent course of management: *vide* 1920 A. L. J. 41.<sup>1</sup> It is not pretended that there was any 'pressure on the estate' nor was there any 'danger to be averted' or 'benefit to be conferred'. The sale of the property for the possible contingency of maintenance will not, to my mind, stamp the alienation with the incidents of transaction dictated by a 'prudent course of management.' As I deal with 3 item, the sum of Rs. 500/- I shall try to show that a slight care would have enabled, her not only to redeem the earlier mortgages but to save a substantial portion of the property.

[11] The usufructuary mortgages embraced 6. 43 acres. The entire estate of her husband consisted of 10. 2 acres besides some miscellaneous plots. The husband had, it is common ground, died about forty years before the suit, which was instituted in 1941. It is not denied that she had been able to live on the income derived from the residue of the land in her hands 3. 59 acres. Not only that, she had succeeded in 1903 and 1908 in recovering a portion of the property in the hands of the mortgagees. I find from the judgment that one of the mortgages was redeemed by raising a loan upon a portion of the property covered by that mortgage, with the result that she paid off the earlier mortgage, freed from the mortgage the rest of the property and retained some money in her hands. The sale of an extensive area of 6. 43 acres for a small amount of Rs. 500/- or Rs. 745/- must from all points of view, be condemned as an improvident transaction. A prudent course of management dictated otherwise. She could have, as he had done in the past, sold—the transactions in effect amount to a sale and nothing less—a small portion and saved the rest, which would have been more than enough for her needs.

[12] I, however, do not propose to pursue this line of reasoning further as, in the view of law, which I propose to take, the transaction is not binding upon the plaintiff for yet another reason. The mortgages of 1903 and 1908, were mortgages with possession. There was, therefore, no pressure on the estate and no danger to be averted. In circumstances almost similar, this Court in 1923 A. L. J. 354<sup>2</sup> refused to uphold an alienation made for redeeming an earlier mortgage, which was not mature. Indeed the facts of the present case are, if possible, stronger than those of that case. That was a case of a hypothecation bond which had not become mature and where the interest was mounting up. Here there was no such apprehension.

[13] I am, therefore, of opinion that the entire transaction was beyond the capacity of the lady and no part of it is binding upon the plaintiff. He



is entitled to the declaration, which was granted to him by the learned Munsif.

[14] On the date of the suit or even up to the date of the decree of the learned Judge, the earlier mortgages had not been redeemed. The proper decree to pass, therefore, is that, if the earlier mortgages are still unredeemed, the plaintiff's suit shall stand decreed with costs in all the Courts. If, on the other hand, they have been redeemed, he is entitled to the decree, conditional on his payment to Khushi Ram, of the sum of Rs. 500.

[15] I, therefore, allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs in all Courts. The plaintiff, who is entitled to the relief claimed shall pay the vendee, Khushi Ram, the sum of Rs. 500/- if the letter has discharged the previous mortgages. In case he has not and the money is still lying in his hands, the plaintiff is entitled to an unconditional decree.

N.S.D.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 370 [C. N. 139.]**

SANKAR SARAN AND RAGHUBAR  
DAYAL JJ.

*Kashi Prasad v. Emperor.*

Criminal Revn. Nos. 70 and 71 of 1946, Decided on 17-4-1947, from order of Sessions Judge, Cawnpore, D/- 12-11-1945.

(a) Criminal P. C. (1898), S. 248 and 403—Withdrawal of complaint—What amounts to.

The Inspecting Assistant Commissioner of Income-tax filed a complaint for prosecution of the accused under S. 52, Income-tax Act read with S. 177, Penal Code. The accused was summoned and appeared on the day fixed but the complainant did not appear and certain necessary documents were also not filed. The Magistrate received a letter from the complainant requesting him to send back the complaint as the record of the case was with the Income-tax Appellate Tribunal and that the complaint would be filed again with all the connected documents. The Magistrate thereupon ordered the papers to be sent back and other papers to be consigned to record room:

*Held* that the order of the Magistrate did not amount to the grant of withdrawal of the complaint and therefore did not operate as an acquittal of the accused.  
*Case law discussed.* [Paras 8 & 17]

(46-Com), Cr. P. C., S. 403, Note 8.

(b) Criminal P. C. (1898), S. 439—Order granting withdrawal of case—Interference in revision.

The High Court has power to revoke the order granting withdrawal of a case: 25 A.I.R. 1938 Nag. 334, 7 A. I. R. 1920 Pat. 362 and 26 A. I. R. 1939 Cal. 220, *Rel. on.* [Para 16]

(46-Com) Cr. P. C., S. 439, Note 17, Pt. 2.

*Cases referred:* —

1. ('87) 12 Mad. 35, *Queen-Empress v. Sivarama.*
2. ('76) 25 W. R. 64 Cr, *The Queen v. Zuhoorul Hug.*
3. ('01) 25 Bom. 422, *Queen Empress v. Hussein Haji.*
4. ('35) 22 A. I. R. 1935 All. 366: 157 I. C. 205, *Alopi Din v. Emperor.*
5. ('23) 10 A. I. R. 1923 Cal. 725: 77 I. C. 892, *Shermull v. Corporation of Calcutta.*

6. ('33) 20 A. I. R. 1933 Nag. 78: 29 N. L. R. 201: 143 I. C. 77, *Kanhaiya Lal v. Baijnath Mahesri.*

7. ('29) 16 A. I. R. 1929 Nag. 133: 25 N. L. R. 6: 118 I. C. 63, *Mt. Rujula v. Emperor.*

8. ('38) 25 A. I. R. 1938 Nag. 76: I. L. R. (1939) Nag. 85: 172 I. C. 130, *Dattatraya Govindrao v. Emperor.*

9. ('34) 1934 A. L. J. 1061: 21 A. I. R. 1934 All. 1025: 153 I. C. 407, *Mahadeo v. Emperor.*

10. ('38) 25 A. I. R. 1938 Nag. 334: I. L. R. 1939 Nag. 393: 174 I. C. 519, *Satwarao Nagorao v. Kanbarao Bhagorao.*

11. ('20) 7 A. I. R. 1920 Pat. 362: 57 I. C. 657, *Gopi Bari v. Emperor.*

12. ('39) 26 A.I.R. 1939 Cal. 220: I.L.R. (1939) 1 Cal. 407: 180 I. C. 384 (S.B.), *Devendra Kumar v. Yar Bakht.*

*S. N. Verma and Brijlal Gupta*—for Applicant.  
*Deputy Government Advocate*—for the Crown.

**Raghubar Dayal J.** — This revision is connected with Criminal Revision No. 71 of 1946 as the facts leading to the common point for determination are identical.

[2] The Inspecting Assistant Commissioner of Income-tax, Cawnpore, filed two complaints against Kashi Prasad for his prosecution under S. 52, Income-tax Act read with S. 177, Penal Code on 14-8-1944. The complaints were transferred to the Court of the Additional City Magistrate on 18th August. The accused was summoned for 9th September. He appeared that day. The complainant did not appear. Certain necessary documents were also not filed. On 12th October the Magistrate sent a letter to the complainant saying that the case had been adjourned thrice for want of prosecution and that the next date fixed was 18th October. On 18th October, the Magistrate received a letter from the complainant. It reads as follows:

"I have the honour to request you kindly to send back the complaints filed in the above case because the records of the case are with the Income-Tax Appellate Tribunal, Allahabad, and are not likely to be in our hands till the end of this week. The complaints will be presented again with all the connected documents."

[3] The Magistrate wrote on this letter:  
"Record be sent back."

[4] The order sheet for this date said that the papers be sent back and the other papers be consigned to records.

[5] On 6-7-1945, the two complaints were received back with a letter. On 14th July the Court asked the complainant to file documents early and ordered that the files be taken out from the Record Room.

[6] On 5-9-1945, the accused applicant filed an objection to the revival of the proceedings on the main ground that the cases being summons cases, the withdrawal of the complaints on 18-7-1944, would be withdrawal under S. 248, Criminal P. C. and its result would be the acquittal of the accused and that, therefore, he could not be tried on the same facts a second time. This objection of the accused applicant did not find favour with the Magistrate and the



Sessions Judge. It is, therefore, that the applicant has filed this revision. We are of opinion that the revision has no force.

[7] It is true that on the withdrawal of a complaint under S. 248, Criminal P. C. an accused is to be acquitted as the section says:

"If a complainant, at any time before a final order is passed in any case under this chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same and shall thereupon acquit the accused".

The section, therefore, requires firstly that the complainant should make a request for the withdrawal of a complaint, secondly that he should satisfy the Magistrate that there are sufficient grounds for the Magistrate's permitting him to withdraw the complaint, thirdly that the Magistrate should permit the withdrawal and lastly that the Magistrate should acquit the accused after he had permitted the withdrawal. None of these facts appears to have been in existence in the course of proceedings on the complaints in the suit.

[8] The complainant's letter, dated 18th October, does not indicate in the least that the complainant desired to give up the prosecution of the accused-applicant on the allegations made in the complaint. No reason is given in that application for any desire of the complainant to withdraw the charges. The order of the Magistrate on that letter is a very brief order and says nothing about his being satisfied with the ground, if any, for the withdrawal of the complaint. The Magistrate does not record that he is satisfied with the reasons and that he permits the withdrawal. In fact it does not appear from the record that the Court exercised any judicial discretion in the matter or even purported to pass any judicial order. The Court happened to have fallen into adopting a wrong procedure as the request for the return of papers was made by a Public Officer. The papers filed in Court are not returned in that manner. The Magistrate passed no order about the fate of the accused. He neither said that the complaint was withdrawn nor that, in the circumstances that the complaints were returned to the complainant, the accused would be discharged or acquitted. It appears that the Magistrate treated the matter as a routine one and just noted on the letter received that the record be sent. This order was amplified by the Court reader in the order-sheet with respect to the papers which were not to be returned to the Income-tax Commissioner. It would not be a matter for surprise if the order about the return of papers was passed by the Magistrate either outside the Court or in the absence of the accused. There appears nothing on the record to indicate that the cases were

called up for hearing and that the order for the return of record was passed in the presence of the accused. We are of opinion that the complainant's request for the return of papers did not amount to a request for the withdrawal of a complaint and that the Court's order, in any way, did not amount to any permission for the withdrawal of the case. It follows, therefore, that the order of 18th October can in no way amount to an order under S. 248, Criminal P. C. It cannot amount to an order of acquittal of the applicant.

[9] The mere fact that the papers were returned to the complainant does not amount to the withdrawal of the complaint. The loss of the complaint paper or theft of the complaint paper by the complainant himself will not amount to a withdrawal of the complaint. The essential idea behind the withdrawal of a complaint is that the complainant desires not to take any further action against the accused on the basis of the allegations made against him or, in other words, that the complainant practically withdraws the allegations.

[10] The order passed by the Magistrate was in effect an order granting an indefinite adjournment to the complainant in the special circumstances urged in the letter — the circumstances being that the necessary documents were not with the complainant but were with the Appellate Tribunal. The order for the return of the complaints to the complainant was a wrong order and related merely to the custody of the complaints and any error in that matter does not go to the root of that question.

[11] Learned counsel for the applicant referred to the cases reported in 12 Mad. 35<sup>1</sup>, 25 W. R. 62,<sup>3</sup> 25 Bom 422.<sup>3</sup> All these cases are distinguishable. There the complaints were withdrawn. The actual orders passed were that the accused be discharged. It was held that the orders of discharge were wrong and that these orders really amounted to an order of acquittal which the law contemplated in those circumstances.

[12] The view we have taken finds support from some reported cases. In A. I. R. 1935 ALL. 366<sup>4</sup> it was observed at page 366 that

"a withdrawal by a public prosecutor is withdrawal from the prosecution of any person for any act or omission made punishable by any law; that is, the Public Prosecutor states that he does not want to prosecute for certain alleged acts or omissions. In the present case there was no case under S. 218, Penal Code."

In the present case, the complainant did not even state in his letter dated 18th October that there was no case against the accused and that he, therefore, wanted to get back the papers.

[13] In A. I. R. 1923 Cal. 725<sup>5</sup> it was held that:

"Section 247, Criminal P. C. gives the Magistrate a discretion and the absence of a complainant in a summons



case cannot result in the acquittal of the accused without the Magistrate passing any order in exercise of that discretion."

The principle enunciated is applicable to the present case. Unless the Magistrate passes an order that the complaint is allowed to be withdrawn, the mere return of the complaint will not amount to an order of withdrawal, and, therefore, the consequences of a withdrawal will not follow.

[14] In A. I. R. 1933 Nag. 78<sup>6</sup> at p. 80 it is observed :

"No consent of the Court to the withdrawal of the prosecution in respect of an offence under S. 363 was ever obtained and it is laid down in A. I. R. 1929 Nag. 1337 that an order passed under S. 494, Criminal P. C. must be passed like any other considered order and the Magistrate is bound to give his reasons. A fortiori is the Magistrate bound to give his consent to a withdrawal? no tacit assent may be assumed. From the order passed—and this is the only record of what took place—it would appear that the Magistrate did not think that his consent was necessary. The Code lays down that the consent is necessary and the order giving the consent is, as has been held in this Court, a judicial order."

In that case the Magistrate ignored the complaint under S. 363, Penal Code on the statement of the Prosecuting Inspector that this section be dropped and the case was transferred to a second class Magistrate. It was, therefore, held that the order did not amount to an order granting withdrawal of the complaint. The same view was repeated in A. I. R. 1938 Nag. 76<sup>8</sup>.

[15] The case may be looked at from another aspect. The order of the Magistrate for the return of the complaint was an order not contemplated by the Criminal Procedure Code. The Court has no jurisdiction to return the complaint. The order was, therefore, an invalid order and, as such, can have no effect. Reference may be made to the case reported in 1934 A. L. J. 1061<sup>9</sup>.

[16] Another way of looking at the case at this stage is that if the order of the Magistrate be taken to be an order granting withdrawal of the complaint, the order is bad inasmuch as no adequate grounds for the withdrawal of the complaint were put forward and the Magistrate did not exercise his discretion judicially in allowing the withdrawal of the case. If the complainant had known that his erroneous request for the return of the complaint instead of direct request for the adjournment of the case for a sufficiently long time had led to the acquittal of the accused, the complainant could have come up in revision and in all probability the order allowing the withdrawal and consequently acquitting the accused would have been set aside. This Court has the power to revoke the order granting withdrawal of a case. This has been held in A. I. R. 1938 Nag.

334,<sup>10</sup> A. I. R. 1920 Pat. 362<sup>11</sup> and A. I. R. 1939 Cal. 220.<sup>12</sup>

[17] We are, therefore, of opinion that the order of 18-10-1944 did not amount to the grant of withdrawal of the complaint and, therefore, did not operate as an acquittal of the accused and that the present trial of the accused on the re-submission of the complaints in July 1945 is valid. We accordingly dismiss this revision.

D.H.

*Revision dismissed.*

[C. N. 140.]

**A. I. R. (34) 1947 Allahabad 372**

**MALIK AND RAGHUBAR DAYAL JJ.**

*Bal Govind — Appellant v. Shri Ram and another — Respondents.*

First Appeal No. 480 of 1942, Decided on 8-8-1946, from decision of (Temporary) Civil Judge, Cawnpore, D/-29-8-1942.

Succession Act (1925), S. 263—Defective citation—Just cause.

Where a will has been proved to be genuine, the grant of the letters of administration cannot be revoked merely on the technical ground that the grant was made without citing proper parties : 15 A. I. R. 1928 P. C. 2, *Foll.* [Para 5]

*Case referred :—*

1. ('28) 7 Pat. 221 : 15 A. I. R. 1928 P. C. 2 : 55 I. A. 18 : 107 I. C. 14 (P. C.), *Mt. Ramanandi Kuer v. Mt. Kalawati Kuer.*

*N. P. Asthana, G. S. Pathak and B. R. Avasthi — for Appellant.*

*S. N. Seth and S. Zakir Ali — for Respondents.*

**Malik J.**—This appeal has been filed by one Bal Govind who had filed an application for revocation of letters of administration granted to the respondents.

[2] *Mt. Raj Rani* was the wife of the appellant, *Bal Govind*. She died in the year 1941. It was alleged by the respondents that she had left a will dated 28-11-1941. An application for the letters of administration on the basis of the will was filed in the Court of the learned Temporary Civil & Sessions Judge, Cawnpore, on 2-2-1942 by *Shri Ram* on behalf of himself and his younger brother, *Shyam Lal*, who was a minor. In that application no relations of *Mt. Raj Rani* were cited to whom special citation could be issued. Even the name of her husband was not disclosed in that application as one of the persons to whom notice should be sent, though in the body of the application it was mentioned that she was daughter of *Jodha* and wife of *Bal Govind*. Under S. 278, Succession Act (39 [XXXIX] of 1925) the application for letters of administration should contain the names of the relatives of the deceased and their respective residences so that notices should be issued to them. No notice was therefore issued



to Bal Govind and the letters of administration were granted to the applicants, Shri Ram and Shyam Lal. On 8-7-1942, Bal Govind filed an application for revocation of the letters of administration on the ground that no notices were issued to him and the letters of administration were fraudulently obtained by concealing the name of Bal Govind. It was further mentioned that the will was forged and the lady had died on 24-11-1941, four days before the date of the alleged execution of the will. The lower Court had, therefore, two points for decision before it, firstly, whether just cause had been made for the revocation of the grant of letters of administration on the ground that special citations were not issued to Bal Govind, and secondly, whether the letters of administration should not be granted because the will relied upon by the applicants was a forged will. Both the parties produced witnesses. It appears that the objector, Bal Govind, led his evidence first and it was after the close of his evidence that the witnesses were examined on behalf of the respondents. The lower Court considered the evidence produced on behalf of the objector as well as on behalf of the respondents and came to the conclusion that the will was genuine and held that there was therefore no sufficient cause for the revocation of the letters of administration. It is against that order that Bal Govind has filed this appeal.

[3] Learned counsel for the appellant has argued that the proper procedure for the Court below was to have annulled or revoked the letters of administration that had already been granted and then asked the propounders of the will to prove the will in the presence of the objector and issued fresh letters of administration if the Court was satisfied as regards the genuineness of the will. His argument is that Shri Ram and Shyam Lal knew of the existence of Bal Govind and of his relationship to Mst. Raj Rani. They had, therefore, deliberately, when making the application for letters of administration, omitted his name though they were bound under S. 278 to mention his name as one of the persons to whom special citations should be issued. He has urged that under S. 263, Indian Succession Act, the grant of probate or letters of administration may be revoked or annulled for just cause and the fact that the letters of administration were obtained by concealing from the Court something material to the case was a just cause for the revocation of the letters of administration. The argument of learned counsel is that this was a case where if his client had come to know of the proceedings and special citations had been issued to him, he would have put the applicants to prove

the will and the will would have been proved in his presence and he would have had an opportunity of cross-examining the witnesses and producing other evidence before the Court to show that the will was not genuine. This argument of the learned counsel has no doubt great force and if the matter had been only at the preliminary stage we would have held that, by reason of the fact that the applicants had not cited the husband as a person to whom special citation should be issued, the ex parte grant of the letters of administration should be revoked and the applicants should be directed to prove the will in the solemn form. But the difficulty has arisen by reason of the fact that the parties themselves produced evidence on the question of the genuineness of the will and after having recorded such evidence as the parties wished to produce, the Court came to the conclusion that the will was genuine. It would be useless waste of time if we were now to ask the Court below to revoke the letters of administration and record the evidence afresh which has already been recorded and then to grant letters of administration.

[4] In a case where the procedure adopted by the trial Court was the same as in this case their Lordships of the Privy Council held that neither party could be said to have been prejudiced by the procedure adopted and went into the question whether the will was or was not genuine, see 7 Pat. 221.<sup>1</sup> Dealing with this point, their Lordships after quoting S. 50, Probate and Administration Act of 1881, which has now been replaced by S. 263, Succession Act, observed as follows:

"It is apparent that the plaintiff in this case set up both these grounds for revocation (that is, that the grant was made without citing parties who ought to have been cited and the will of which probate was obtained was a forgery). . . If these issues were tried separately and the plaintiff succeeded on the first issue, that in itself would be sufficient for revoking the probate; but it would still be open to the defendant to prove the will and, if she succeeded, the probate would stand.

"If on the other hand the plaintiff failed on the first issue that would not preclude her from proceeding to prove her second ground, viz., that the will was forged, and the probate would stand or fall, according to the result."

[5] It would appear from the above quotation that where a will has been proved in the solemn form, after citing the parties who ought to have been cited and there is no just cause for revocation, if any one of them challenges the validity of the will, and wants the probate revoked on that ground, then it is for him to prove that the will was forged. If, on the other hand, there is sufficient ground for revoking the probate apart from the question of genuineness of the will then it is for the propounder of the will to prove



the will afresh in the presence of the objector. Their Lordships go on to observe that these two issues might have been tried separately, but they were not so tried in fact as evidence was given by each party in support of their respective cases in both issues together and not separately. That is exactly what has happened in this case, and under these circumstances, we consider that it would be proper that we should consider the evidence for ourselves and see whether the decision of the Court below that the will is genuine is correct. We do not think that we can merely on the technical ground, that proper parties were not cited, now hold that this appeal should be allowed and the grant of letters of administration should be revoked and the case sent back for consideration of the question whether the will is or is not genuine. [Their Lordships discussed the evidence as to the genuineness of the will and concluded:] In the result, we are satisfied that the will is the will of Mt. Raj Rani and was duly executed by her and the letters of administration issued by the Court below cannot, therefore, be revoked. This appeal is dismissed with costs.

V.B.B.

*Appeal dismissed.*

A. I. R. (34) 1947 Allahabad 374 [C. N. 141.]

SINHA J.

*Mt. Chanda Devi—Plaintiff — Appellant v. Mt. Kirpa and others—Defendants—Respondents.*

Second Appeal No. 1972 of 1944, Decided on 28-11-1946, from decision of First Civil Judge, Meerut, D/-10-1-1944.

Easements Act (1882), S. 15, para. 5 — Scope — Effect of S. 47.

Even though the plaintiff or her predecessor might have been flowing the water of the roof through the *abchak* land for a period of twenty years or even more, nevertheless if they ceased to exercise that right "within two years, next before the institution of the suit wherein the claim to which such period relates is contested", that right fails: 17 I. C. 22 (All.) and 1 A.I.R. 1914 All. 68, *Rel. on.* [Para 7]

In such a case, S. 47 of the Act cannot be applied and it cannot be contended that the right could only be lost if it had not been enjoyed for an unbroken period of twenty years. [Para 6]

*Cases referred :—*

1. ('12) 10 A. L. J. 227 : 17 I. C. 22, Sultan Ahmad v. Waliullah.
2. ('14) 12 A. L. J. 415 : 1 A. I. R. 1914 All. 68 : 24 I. C. 126, Muhammad Maruf v. Sultan Ahmad.

*S. B. L. Gour—*for Appellant.

*A. P. Gupta—*for Respondents.

**Judgment.**—This is a plaintiff's appeal and arises out of a suit for demolition of a wall and for possession of the land covered by it. There was a further relief for a perpetual injunction restraining the defendants from making any construction.

[2] The case with which the plaintiff came to Court was that she had been the owner of an *abchak* existing between her house and that of the defendants, as indicated by letters ABLM in the map attached to the plaint, that the plaintiff's drain drained out water into this *abchak* and her latrine water from the latrine BCDE also flowed through it. She alleged that she had been exercising the right of the flow of the water for more than twenty years and the construction of the wall by the defendants had blocked the flow.

[3] Defendants 1 and 2 resisted the claim on the ground that the plaintiff was not the owner of the land ABLM and that there never was any *abchak* at the place suggested by the plaintiff. It was also pleaded that the latrine BCDE was a new construction and the plaintiff had not acquired any easement either to flow the rain water or the latrine water through ABLM, which was claimed by them as their land.

[4] The learned Munsif held that the plaintiff was not the owner of the disputed land; it, on the other hand, belonged to defendants 1 and 2. He also found that, though at one time the rain water of the plaintiff's roof flowed into the disputed land, nevertheless the plaintiff's *kothas* or roof had not been in existence for the last seven years and so whatever rights she had, she has lost. As regards the latrine it was held that it was constructed only about seven years before the suit and no right of easement could be acquired by the plaintiff. The learned Judge affirmed the decision of the learned Munsif.

[5] The learned counsel for the appellant in this second appeal does not challenge the finding of the Court below as regards the latrine. He, however, contests the finding as regards the *abchak* land and also as regards her right to flow the water of the *kotha* or the roof. The finding that the *abchak* land belongs to the defendants and not to the plaintiff is a finding based upon the evidence on the record and is not open to challenge in this second appeal and I must accept it.

[6] The learned counsel takes his stand upon S. 47, Easements Act and contends that the right could be lost if it had not been enjoyed for an unbroken period of twenty years, and, as the period in this case is only seven years, there can be no extinction of the right. This argument loses sight of the fifth paragraph of S. 15 of the Act which says :

"Each of the said periods of twenty years shall be taken to be a period ending within two years, next before the institution of the suit wherein the claim to which such period relates is contested."

The view which the Courts below have taken is in consonance with that taken by this Court in



10 A. L. J. 227.<sup>1</sup> Chamier, J. in deciding the case observed as below :

"(a) The meaning of the findings on the first and third issues is that the defendants enjoyed the old western right of way over plot No. 1640 as an easement and as of right for more than twenty years up to within 16 or 17 years of this suit and then abandoned it, or at all events the southern part of it in order to go direct to a new door opened by them.

(b) It seems to me that the result of these findings is that the defence fails. The para. 5 of S. 15, Easements Act seems to render it impossible to acquire a statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit . . . . . The para. 5 of S. 15, Easements Act applies to both continuous and discontinuous easements."

This judgment was affirmed, on appeal under S. 10 of the Letters Patent, by a Bench of this Court in a case reported in 12 A. L. J. 415.<sup>2</sup> The learned Judges have put it, if I may say so with respect, very clearly. Say they :

"Under S. 15, Easements Act, under which alone the right of easement was claimed, the period of user must be twenty years or more ending within two years before the institution of the suit wherein the claim to which such period relates is contested."

[7] The result is that, even though the plaintiff or her predecessor might have been flowing the water of the roof through the *abchak* land for a period of twenty years or even more, nevertheless if they ceased to exercise that right "within two years, next before the institution of the suit wherein the claim to which such period relates is contested", that right fails. I think the view taken by the Courts below is right and I dismiss this appeal with costs.

R. G. D.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 375 [C. N. 142.]**

**MALIK AND RAGHUBAR DAYAL JJ.**

*Doongarsee Syamji Joshi and others — Plaintiffs — Appellants v. Mukhia Tirbhuwan Das and others — Defendants — Respondents.*

First Appeal No. 87 of 1942, Decided on 9-9-1946, from decision of Addl. Civil Judge, Muttra, D/- 14-11-1941.

(a) Hindu law — Religious endowment — Private idol—Right of stranger to sue as next friend of idol.

A deity cannot be treated as a minor to make O. 32, C. P. C. applicable so as to enable any disinterested third party to bring a suit as next friend of the deity.

No doubt ordinarily it is the shebait or *de jure* or *de facto* Manager who has the right to sue for protection of the idol's property. But it cannot be said that the idol has no right of suit. Where the person in charge of the idol and its property acts adversely to the interests of the idol, a disinterested third party though not belonging to the founder's family, can sue as next friend of the deity but such a suit must be in the interest of the idol and for vindication of its rights, and not for getting hold of its property : 32 A. I. R. 1945 Cal. 268 ; 29 A. I. R. 1942 Cal. 99 and 24 A. I. R. 1937 Cal. 559, *Rel. on; Case law discussed.* [Paras 8, 12, 13]

(b) Hindu law — Religious endowment — Private and public idol — Distinction — Civil P. C. (1908), S. 92.

There is really no such thing as a private idol being the private property of an individual or a family and a public idol belonging to the public. According to Hindu philosophy, an idol, when it is installed in a temple, is the physical personification of the deity and after consecration the stone image gets its soul breathed into it. Before an idol can be installed in a temple the temple must be dedicated to it and it becomes its private property. [Para 15].

Under the strict Hindu law a temple building is the property of God and cannot be the private property of an individual or a family or a section of the public. The property dedicated to an idol in an ideal sense vests in the deity, though no Hindu professes to give the property to God. He only dedicates it to the worship of God and under the strict Hindu law the King, who is the servant and the protector of the deity, is the custodian of the property: 37 Cal. 128 and 12 A. I. R. 1925 P. C. 139, *Rel. on.* [Pra 15].

The only difference between a private and public temple is that while in the former the public at large have no right of worship or management they have these rights in the latter. In both, the rights and liabilities of the deity are the same. But where property is dedicated to the idol with directions as regards the income, people who are beneficially interested in the fund may have certain independent rights of their own. In the case of a public temple the public are entitled to have their rights protected under S. 92, Civil P. C. In the case of a private temple, a person not belonging to the founder's family has no right to sue as next friend of the deity except where the person in charge of the deity acts against its interests and the suit is brought in the interest of the deity and for vindication of its rights. [Para 17]

(144-Com) Civil P. C., S. 92 N. 5, N. 8.

(c) Civil P. C. (1908), S. 92—Private idol—Scheme, if can be prepared — Right of person appointed trustee or manager to bring suits — Hindu law — Religious endowment—Idol.

In a proper case where all parties interested in a deity or its management or worship are impleaded and the deity itself is represented by a disinterested third party the Court may prepare a scheme which may be binding against third persons not so interested; for example, if in the case of a private deity all persons interested therein are parties to the suit, a scheme may be prepared by the Court, and a trustee or manager appointed under the scheme can claim rent from tenants or eject a trespasser or file suits in his own name as shebait and the Courts will not allow the defendant to raise the question of the propriety of his appointment. Even a *de facto* shebait or *de facto* mutwalli can bring such suits : *Case law relied. on.* [Para 20]

(144-Com.) Civil P. C., S. 92 N. 5.

(d) Civil P. C. (1908), S. 92 — Private idol— Suit to frame scheme—Necessary party—Compromise.

In a suit to frame a scheme in respect of a private idol the *de facto* manager or shebait at the time of suit is a necessary party. When he was not impleaded as a party a compromise decree passed therein framing a scheme and appointing certain persons as trustees of the idol and its properties cannot bind him and cannot be made the basis of a suit to eject the *de facto* manager. [Para 21]

(144-Com.) Civil P. C. S. 92 N. 28, 29.

(e) Civil P. C. (1908), S. 92 — Suit under — Nature of.

A suit for a scheme under S. 92 is filed in a representative capacity and on behalf of the public and as such the other members of the public may be bound by the decision. When the suit was not a representative one



the decree cannot bind anybody who was not a party.  
[Para 20]

('44-Com.) Civil P. C., S. 92 N. 7 Pt. 1.

(f) Letters Patent (Bombay), Cl. 12 — Deity at Muttra — Suit against *de facto* manager—Jurisdiction of Bombay High Court — Civil P. C. (1908), S. 92.

Where a deity situate at Muttra had properties at Bombay and Muttra and the *de facto* manager carried on the worship of the deity at Muttra and managed its Muttra properties, any suit against the *de facto* manager either for possession of the property situate there or for a scheme could not under cl. 12 be filed in Bombay High Court.  
[Para 23]

('44-Com.) Civil P. C., S. 92 N. 38.

*Cases referred :—*

1. ('45) 32 A. I. R. 1945 Cal. 376 : I. L. R. (1944) 2 Cal. 144, Sri Annapurna Devi v. Shiva Sundari.
2. ('45) 32 A. I. R. 1945 Cal. 268, Jyoti Prasad v. Jahor Lal.
3. ('23) 45 All. 319 : 10 A. I. R. 1923 All. 160 : 71 I. C. 480, Sheo Ramji v. Sri Riddhnath Mahadeoji.
4. ('05) 32 Cal. 129 : 31 I. A. 203 : 8 Sar. 698 (P. C.), Jagadindra Nath Roy v. Hemanta Kumari.
5. ('41) I. L. R. (1941) 2 Cal. 477 : 29 A. I. R. 1942 Cal. 99 : 199 I. C. 486, Tirit Bhusan Ray v. Sridhar Saligram.
6. ('37) 24 A. I. R. 1937 Cal. 559 : 41 C. W. N. 1349 : 174 I. C. 122, Panchakari Roy v. Amodelal.
7. ('10) 37 Cal. 128 : 3 I. C. 642, Bhupati Nath v. Ram Lal.
8. ('25) 52 I. A. 245 : 52 Cal. 809 : 12 A. I. R. 1925 P. C. 139 : 87 I. C. 305 (P. C.), Pramatha Nath v. Pradhyumna Kumar.
9. ('35) 57 All. 159 : 22 A. I. R. 1935 P. C. 44 : 62 I. A. 47 : 153 I. C. 1100 (P. C.), Mahadeo Prasad Singh v. Karia Bharti.
10. ('31) 35 C. W. N. 768 : 18 A. I. R. 1931 Cal. 776 : 135 I. C. 273, Girishchandra Saw v. Upendra Nath.
11. ('15) 37 All. 86 : 2 A. I. R. 1915 All. 25 : 26 I. C. 778, Niamat Ali v. Ali Raza.
12. ('27) 14 A. I. R. 1927 Mad. 69 : 98 I. C. 812, Moideen Bibi Ammal v. Rathnavelu Mudali.

*G. S. Pathak, V. D. Bhargava and Ajai Singh—*  
for Appellants.

*S. C. Das and D. Sanyal —* for Respondents.

**Malik J.** — The facts of this case are very simple. One Khetsi Tilloo was a Hindu residing in Bombay. He came to Muttra and ultimately settled there. He had a private deity and before he died he executed a will dated 25-10-1909, by which he dedicated all his properties to the deity. The deity is known as Charnarvind Sri Thakur Gokuleshji Maharaj and is installed in the house situate in Golpara at Muttra. In accordance with the terms of this will one Mt. Saraswati Bai, who was no relation of Khetsi Tilloo and, as a matter of fact, belonged to a different caste, was appointed the manager and mutwalli after him. On her death, one Chaturbhuj son of Dongersi, who was the wife's sister's son of Khetsi Tilloo, was to be the mutwalli. Khetsi Tilloo did not nominate any one as mutwalli after Chaturbhuj. He, however, appointed four persons as managers or supervisors and gave them the right to nominate a mutwalli after the

death of the two persons nominated by him. The will further provided that the four persons nominated by him or their survivor had the right to appoint a successor to any of them. It is admitted that the four supervisors are all dead and that they took no interest in the deity or in its management, nor did they appoint any one as their successor. It is further the common case of the parties that Chaturbhuj Doongarsee predeceased Mt. Saraswati.

[2] Khetsi Tilloo died on 27-3-1914. On his death, Mt. Saraswati became the mutwalli and, as such, was in possession of the property dedicated to the deity. Chaturbhuj died sometime in the year 1935 and Mt. Saraswati died in September 1936. Mt. Saraswati had on 27-2-1936 executed a will under which she appointed Mukhia Tirbhuwan Das, defendant 1 as the mutwalli. This she must have done as she realised that Chaturbhuj being already dead and the four supervisors appointed by the founder having all died there was no one who could appoint the next mutwalli. She further nominated five persons as trustees or supervisors and gave them the same powers as had been given to the supervisors appointed by Khetsi Tilloo, the only difference being that while the will of Khetsi Tilloo was a brief document, Mt. Saraswati's was more elaborate and contained clearer directions as to the management and *sewa, puja*. After the death of Mt. Saraswati, Mukhia Tirbhuwan Das, defendant 1 took charge of the deity and its *sewapuja* and took possession of the properties at Muttra. Since September 1936 Mukhia Tirbhuwan Das has thus been managing the property of the deity at Muttra.

[3] In the trust properties are included houses Nos. 105 and 107 situate in mohalla Khand Bazar, Qazi street, Bombay. In the will of Khetsi it was provided that Chaturbhuj Doongarsee was to realise the rent of these houses and pay Rs. 50 per month to Mt. Saraswati for the expenses of the Thakurji and the rest of the income he could utilise for his own purposes. It is clear from the will of Khetsi that the two houses were dedicated to the deity but Chaturbhuj during his lifetime was to remain in possession of the two houses and utilise the balance of the income, after payment of Rs. 50 for his own purposes. There is no provision for Chaturbhuj's wife or his descendants. After the death of Mt. Saraswati, when Mukhia Tirbhuwan Das got into possession of the property of the deity at Muttra and started managing the same, he gave notice on 19-10-1936, to Mst. Velabai widow of Chaturbhuj, claiming Rs. 2,500 from her as the income of the houses. Mt. Velabai, it appears, did not send any reply. On 1-7-1937 plaintiff 1 Doongarsee Shyamji Joshi of Bombay, filed a suit in the Bombay High Court as the



next friend of the deity against Velabai for possession of the properties belonging to the deity and for the preparation of a scheme. The suit was compromised and a compromise decree was prepared on 6th August 1937 under which Dongarsee Shyamji Jhosi, Gordhan Das Vallabh Das Dayal and Velabai were appointed managers and trustees of the properties of the deity.

[4] It is on the strength of this consent decree of the Bombay High Court that the present suit was filed. In the plaint the plaintiffs claimed that defendant 1 was not a validly appointed mutwalli of the deity and was not entitled to attend to or carry on the worship. Possession of the house in Muttra was claimed and it was prayed, among other prayers, that a decree in favour of the plaintiffs for possession of the house and certain movable properties might be passed in their favour. It may be noted here that no allegations were made in the plaint about mismanagement of the properties nor was there any charge that defendant 1 had not duly performed (?) and looked after the deity. The plaint was based simply on the allegation that the defendant had no legal right to possession as Mt. Saraswati could not appoint her successor and that the plaintiffs were legally entitled to bring the suit and to eject the defendant and obtain possession of the property.

[5] The suit was defended on the ground that the plaintiffs had no right to bring the suit. The defendant also alleged that he had been duly appointed the mutwalli and that he was not bound by the decree of the Bombay Court to which he was no party and which was further alleged to be a collusive decree. Defendants 2 to 5 were the supervisors nominated by Mt. Saraswati and it does not appear that they filed any written statement or took any interest in the suit. Defendant 6, Bhikhimal Saraf, (who on the death of Ram Das defendant became defendant 5), was in possession of certain movables belonging to the deity and was, therefore, impleaded. He too does not appear to have put in any appearance.

[6] The lower Court framed nine issues. It held that Mt. Saraswati had no right to appoint her successor and the defendant was, therefore, not a duly appointed mutwalli, but he was in fact, in possession of the property and was the *de facto* manager of the deity. As regards the plaintiffs, the lower Court held that plaintiffs 1 to 3 had no right to bring the suit and that the defendant was not bound by the decree of the Bombay High Court which the lower Court held was also collusive. The result, therefore, was that the plaintiffs' suit was dismissed with costs.

[7] The plaintiffs have filed this appeal. On behalf of the plaintiffs, learned counsel for the

appellants has urged two points. His allegations are firstly that the deity is himself a party to the suit through a next friend and the position of a deity being exactly the same as that of a minor, any one could file a suit as the next friend of the deity and if the lower Court had considered that another person should be appointed as the next friend the Court should have made the appointment, but no such objection having been taken it must be now accepted that plaintiffs 1 to 3 could act as the next friends of the deity and the deity being the owner of the property the suit was bound to be decreed. His next argument is that the decree of the Bombay High Court preparing the scheme of management is binding on all, and though the defendants were no parties to the same, their only remedy was to go to the Bombay High Court and to ask that Court to modify the scheme if they could satisfy that Court that the scheme was not in the best interest of the deity and that the defendant could not in this case ask the Court to go behind that decree and to hold that plaintiffs 1 to 3 were not the properly appointed trustees of the property at Muttra.

[8] The first argument of learned counsel is that any one can file a suit as the next friend of the deity and that to such a suit the provisions of O. 32, Civil P. C. though strictly not applicable, should be applied so that the decree could be passed in favour of the deity and all that the Courts need see is whether the person purporting to act as the next friend has any interest adverse to the minor and in case the Court is of the opinion that the person purporting to act as the next friend is not a proper person, the Court may appoint some one else. Learned counsel has further developed this argument by urging that the deity was a plaintiff to the suit as plaintiff 4 and that the suit was brought on behalf of the deity by plaintiffs 1 to 3 as the next friends. The defendants, if they had any such objection, should have urged in the Court below that plaintiffs 1 to 3 had some interest adverse to the deity, and in that case the Court might have appointed another next friend on the analogy of O. 32 and the rules in that order framed by this Court. That the defendants never having taken any such objection in the Court below it must be held that no objection could be taken to plaintiffs 1 to 3 acting as next friends of the idol. The analogy of a deity being treated as a minor is a very imperfect analogy and we cannot carry it far enough to make O. 32, Civil P. C. applicable. In cases where the sebaits of a temple have done something which is obviously adverse to the interest of the institution it may be that the Courts would allow a disinterested third party to file a suit, but such suits must be filed in the



interest of the foundation or the deity, as the case may be. The cases relied on by learned counsel where a sebaite transferred property belonging to the deity and a stranger was allowed to file a suit as next friend can be distinguished on that ground.

[9] Learned counsel has relied on the case in A. I. R. 1945 Cal. 376.<sup>1</sup> In that case an application was filed by Sm. Karunamoyee Dassi who wanted to be appointed the next friend of the plaintiff deity Thakurani Sri Sri Annapurna Debi with the object of continuing the suit in the name of the idol for the setting aside of certain transfers of the debutter property made by the sebaite. The argument was that ordinarily the proper person to sue on behalf of an idol was the sebaite and that in certain circumstances it may be that somebody else could be appointed to look after the interests of an idol in a suit. It was held by Sen J.:

"It is obvious that circumstances may well arise when it would be impossible to expect any of the sebaits to institute a suit; for instance, all the sebaits may be misappropriating debutter property and secularizing it; the idol may be despoiled by all the sebaits acting in concert. In such a case, it is not possible to expect any of the sebaits to institute a suit to protect the property of the idol. In those circumstances what is to happen? It seems to me that the only course open would be for some person to come forward and institute a suit as the next friend of the idol. The matter would first come up before the Court by a suit being instituted by a person claiming to be next friend of the idol. It would be permissible for the defendants thereafter to come up before the Court and contest the fitness of the next friend to act as such. The Court would then investigate the matter and decide upon the suitability of the persons instituting the suit to act as next friend."

[10] Learned counsel strongly relied on these observations, but, to our mind, those observations must be restricted to a suit of the nature before that Court where the suit was brought obviously in the interest of the deity to protect it from its sebaits who were trying to misappropriate the debutter property, the reason being that in a case of that kind the only way the Court could give relief to the deity was by holding that the action of the sebaits was illegal and was not binding on the deity.

[11] Learned counsel has also referred to certain observations of a Bench of the Calcutta High Court in A. I. R. 1945 Cal. 268.<sup>2</sup> The facts of that case were that there was a suit filed by a Hindu deity Sri Sri Iswar Sridhar Jieu Thakur for the recovery of some money lent, and the question that arose in that case was who was the proper person entitled to represent the deity in that suit. Tushar Ranjan claimed to represent the deity as one of the plaintiffs (plaintiff 2), the suit being constituted as one by the deity

represented by its sebaits. Plaintiff 1 was Nir-mal who was also one of the sebaits. The other sebaite Harimohan was impleaded as a *pro forma* defendant. The trial Court at first held that the loan was not due to the deity, but the advance was made by Harimohan out of his private funds and dismissed the suit. There was an appeal in the Calcutta High Court which was allowed and the case was remanded. After the remand none of the plaintiff-sebaits appeared and the pleader informed the Court that he had no instructions to proceed with the case. The result was that the suit was dismissed for default. It was at this stage that Jyoti Prasad appeared on the scene and claimed that he had been appointed sebaite under a document executed by Harimohan who was one of the sebaits and he filed an application for restoration of the suit on the allegation that the other sebaits had entered into a collusive arrangement with the debtors at the expense of the deity and the question, therefore, arose whether Jyoti Prasad could continue the proceedings. Various points were raised in the case, one of the points being whether the suit must be deemed to be a suit by the deity or by the sebaite. It was argued that if it was a suit by the sebaite then Jyoti Prasad's application to continue the suit must be deemed to be barred by limitation under S. 22 (1), Limitation Act. The main discussion in the case centred round the point whether the right to sue vested in the deity or in its sebaits, as it was held that Jyoti Prasad was also a duly appointed sebaite. The case is not very helpful for the decision of the point whether a third party can or cannot file a suit as next friend, but even in that case Jyoti Prasad was allowed to continue the suit on the finding that the sebaits who had originally filed the suit had colluded with the defendants and had done something which was prejudicial to the interest of the deity. The decision of this Court in 45 ALL. 319<sup>3</sup> by Ryves and Daniel JJ. is also to the same effect. That was a suit for the recovery of property wrongfully alienated by the sebaite and it was held that the suit by a disinterested person connected with the idol acting as its next friend was maintainable.

[12] In the case before us there are no allegations that it is in the interest of plaintiff 4, the deity, that the defendant should be removed and plaintiffs 1 to 3 put in charge of its property, nor are there allegations of any waste or mismanagement. There are no allegations in the plaint that defendant 1 is not a fit person to look after the deity or that he is not looking after the deity and its property properly. Neither the defendant nor plaintiffs 1 to 3



can claim to be the properly appointed sebait of the deity and Saraswati Bai, who was the last sebait, was as great a well wisher of the deity as plaintiffs 1 to 3 and it cannot be said that when she selected defendant 1 and put him in charge, though strictly speaking she may not have had the legal authority, she did not act in the best interest of the deity. The result of accepting the argument of learned counsel would be that any person can constitute himself as the next friend of a deity and file a suit in the name of the deity for possession of the property by the dispossession of a *de facto* sebait who may be managing the property and looking after the deity to the satisfaction of everybody and get hold of the property in the name of the idol till such time as he is dispossessed again by somebody else. We are not prepared to hold that such is the law that any third person can constitute himself as next friend and file a suit and claim an absolute right to possession of the property simply because he has filed the suit in the name of the deity.

[13] Learned counsel for the respondent has placed great reliance on a decision of their Lordships of the Judicial Committee in 32 Cal. 129.<sup>4</sup> In that case their Lordships dealing with the respective rights of an idol and its sebait held that though the idol was the owner of the property the sebait had the right of management, and dealing with the question of limitation whether a suit brought by a sebait who was a minor on the date when the cause of action arose and who brought the suit within 3 years after attaining majority was within time, their Lordships observed :

"But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belongs to the sebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the sebait, not in the idol. And in the present case the right to sue accrued to the plaintiff when he was under age . . . . ."

Learned counsel for the respondent has urged that the idol has no right of suit and the right vests only in the sebait. The point was fully considered by Nasim Ali and Biswas JJ. in A.I.R. 1945 Cal. 268<sup>2</sup> and by Nasim Ali and Pal JJ. in I.L.R. (1941) 2 Cal. 477.<sup>5</sup> In the latter case Nasim Ali J. pointed out the similarity and the difference between a minor and a Hindu idol. In every suit the question arises whether the suit is brought in the enforcement of the right which vests in the plaintiff who has filed the suit, and in a case where a sebait has filed a suit for the enforcement of his own rights there can be no doubt that he is entitled to maintain the

suit in his own name. An idol, though it is a juristic person, is in charge of its sebait who, for all practical purposes, represents it. But there may be cases where the right of the sebait and the right of the idol are at conflict and in such a case it may be that the idol may bring a suit for the vindication of its rights through a disinterested third party as its next friend. We do not think we can accept the contention of learned counsel for the respondent that an idol has no right of suit at all, though we agree with him that a suit in the name of the idol can be filed only in the interest of the idol and not with the object of getting hold of its property by the person purporting to act as next friend.

[14] Learned counsel for the respondents has also relied on a decision of the Calcutta High Court in A. I. R. 1937 Cal. 559<sup>6</sup> where in a case of a private debutter it was held that a third party, who was not a member of the family, had no right of suit and that such right was possessed only by a *de jure* manager or by a *de facto* manager who was in possession of the property and was exercising the right in the interest of the idol. His contention is that this is a case of a private debutter and the deity and its property are in the possession of the defendant who is, therefore, its *de facto* manager and the plaintiffs' suit being a suit for possession merely on the strength of the compromise decree of the Bombay High Court the only point for decision in the case is how far the compromise decree of the Bombay High Court binds the deity and the defendant. To our mind, this contention is correct, though we must say that there is a certain amount of misconception about the term "private idol" and "public idol".

[15] There is really no such thing as an idol which is the private property of an individual or a family or which belongs to the public. According to Hindu philosophy, an idol, when it is installed in a temple is the physical personification of the deity and after consecration the stone image gets its soul breathed into it. Before an idol can be installed in a temple, the temple must be dedicated to it and it becomes its private property. The books of ritual contain a direction that before removing the image into the temple the building itself should be formally given away to God for whom it is intended. The *sankalpa*, or the formulae of resolve, makes the deity himself the recipient of the gift which, as in the case of other gifts, has to be made by the donor taking in his hands water, sesamum, the sacred kush grass and the like. It is this ceremony which divests the proprietorship of the temple from those who had built it and vests it in the image which by the process of vivification



has acquired existence as a juridical personage. A temple building, therefore, under the strict Hindu law is the property of God and the idol and cannot be the private property of an individual or a family or a section of the public. The property dedicated to an idol in an ideal sense vests in the deity, though no Hindu professes to give the property to God. He only dedicates it to the worship of God and under the strict Hindu law the King, who is the servant and the protector of the deity, is the custodian of the property : see 37 Cal. 128<sup>7</sup> at p. 153.

[16] In 52 I. A. 245,<sup>8</sup> a case in which the question of the location of the private idol was in suit, their Lordships of the Judicial Committee observed :

"It must be remembered in regard to this branch of the law that the duties of piety from the time of consecration of the idol are duties to something existing which, though symbolising the Divinity, has in the eye of the law a status as a separate *persona*."

At page 255 of the same report their Lordships refused to give countenance to the argument that the idols or images which Mutty Lal had set up were his personal property and that he had left them absolutely to Jadu Lal and Jadu Lal might, if he had so pleased, have thrown them into the river. Again at page 256, their Lordships have observed :

"An argument which would reduce a family idol to the position of a mere movable chattel is one to which the Board can give no support. They think that such an argument is neither in accord with a true conception of the authorities, nor with principles."

In that case, though the temple was a private temple, their Lordships held that the will of the idol in regard to location must be respected and sent the case back to the High Court of Calcutta with a direction that the idol should appear by a disinterested next friend appointed by the High Court, so that the wishes of the idol may also be ascertained by the Court with respect to its location.

[17] To our mind, the only difference between a private and public temple is that while in a private temple the public at large have no right to worship or right of management, they have these rights in a public temple. In both such trusts the rights and liabilities of the deity must always be the same. This does not apply to a case where, though the property is dedicated to the idol, there are further directions as regards the income and in such cases people, who are beneficially interested in the fund, may have certain independent rights of their own. In the case of a public temple the public have a right of worship and a right of management and they are entitled to have their rights properly protected under s. 92, Civil P. C. In the case of a private temple the Court would not entertain a

suit at the instance of a person who can have no interest in the temple as he does not belong to the family of the founder. Courts may, in those special cases where the person in charge of a private temple or its properties has done something against its interest, allow a member of the public to act as the next friend of an idol to bring a suit solely in the interest of the idol and for the protection of the property, but such a suit cannot be entertained unless it is clear that the suit has been filed in the interest of the idol and for the vindication of its rights. We have already held that there are no allegations in the plaint that this is a suit of that nature. The suit is in vindication of the right of plaintiffs 1 to 3 to be the persons entitled solely to look after and manage the property of the deity and that claim of the plaintiffs can only be based on the compromise decree of the Bombay High Court.

[18] Coming to the decree of the Bombay High Court, we have already mentioned the circumstances in which the consent decree was passed by that Court. The suit was filed on the original side of the Bombay High Court by Thakur Gokleshji Maharaj through its friend Doongersey Shamji Joshi of Bombay against Velabai, widow of Chaturbhuj Doongersey. The relief claimed in the plaint, as appears from the consent decree, was that it be declared that the properties described in Exs. A and B to the plaint, that is, the properties in Bombay and Muttra, belonged to the deity and that some fit and proper person be appointed to conduct the worship of the plaintiff deity with power to take charge of and manage the said properties and lastly that a scheme be framed for regulating the worship of the plaintiff and for appointment of successors to continue the worship of the plaintiff. Velabai was not interested in the trust or the trust properties, she being the widow of Chaturbhuj Doongersey who had predeceased Saraswati Bai. Chaturbhuj Doongersey was the wife's sister's son of the founder and it cannot be said, therefore, that he belonged to the family of the founder. His widow was no doubt in wrongful possession of the house property in Bombay, otherwise she had no interest. We do not know what interest Doongersey Shamji Joshi had in the deity. The case was compromised and Doongersey Shamji Joshi, Velabai and one Gordhandas Vallabhdas Dayal, became the managers and trustees under this compromise. In the compromise no rights were reserved for the heirs of the founder—we do not know whether there were any—and it was assumed that the right of worship was vested in the family of Chaturbhuj Doongersey. Under the law, as we have already said, the family of Chaturbhuj Doongersey had no such vested







Court, or where the cause of action has arisen within the same limits, and if the cause of action has arisen in part within the local limits of the ordinary original jurisdiction of the Court, then with the leave of the Court, or if the defendant at the time of the commencement of the suit was living or carrying on business within those limits. The deity in the case before us was in Muttra. The defendant was in charge of its property at Muttra and was carrying on the worship of the deity at Muttra. Any suit against the defendant who was the de facto manager either for possession of the property situate there or for a scheme could not be filed in the Bombay High Court, and we, therefore, agree with the contention of learned counsel for the respondent that the Bombay High Court had no jurisdiction to entertain the suit for preparation of a scheme for the worship of the idol situate in Muttra. In the result this appeal is dismissed and the decree of the trial Court is affirmed. Plaintiffs 1 to 3 must pay the costs of the defendant-respondents in both the Courts.

G.N.

*Appeal dismissed.***A. I. R. (34) 1947 Allahabad 382 [C. N. 143.]**

SINHA AND RAGHUBAR DAYAL JJ.

*Bhola Nath and others—Judgment-debtors—Appellants v. Panna Lal—Decree-holder—Respondent.*

Ex. First Appeal No. 93 of 1945, Decided on 10-3-1947, from decision of Civil Judge, Allahabad, D/-31-1-1945.

Civil P. C. (1908), O. 3, R. 4—Advocate—Power to compromise.

An Advocate engaged by the holder of a decree can compromise the decree on behalf of his client without specific authority : 17 A. I. R. 1930 P. C. 158, *Rel. on.* [Paras 8, 9]

(44-Com) C. P. C., O. 3 R. 4 N. 7 Pt. 7.

*Case referred :—*

1. (30) 1930 A. L. J. 489; 17 A. I. R. 1930 P. C. 158; 57 Cal. 1311; 57 I. A. 133; 123 I. C. 545 (P. C.) Surendra Nath v. Tarubala Dasi.

*N. P. Asthana, G. S. Pathak and B. N. Misra—for Appellants.*

*G. P. Bhargava—for Respondent.*

**Sinha J.**—This is an appeal by the judgment-debtors against an order of the learned Civil Judge of Allahabad, refusing to certify the adjustment of a decree. On the basis of a mortgage granted by Bhola Nath and others, Mool Chand obtained a preliminary decree for a sum of Rs. 9,990-15-0 which was made final on 6-11-1943. After the usual proceedings, 22-12-1944 was fixed for the auction sale. Mool Chand had meanwhile transferred his decree in favour of the respondent, Panna Lal.

[2] On 21-12-1944, that is one day before the date of the sale, the judgment-debtors presented an application, supported by an affidavit sworn

by Bhola Nath, under O. 21, R. 2, Civil P. C. praying for the adjustment of the decree, on the allegation that it had been settled that Panna Lal would accept Rs. 7,000 in full satisfaction of the decree. This application was resisted by Panna Lal. He did not say that there was no talk of an adjustment. His case was that it was agreed that the money would be paid to him by 1st of December, and, as that was not done, the negotiations failed.

[3] The learned Civil Judge found that the story with which the judgment-debtors went to the Court in support of their application, was not a true story; on the other hand, the truth lay with Panna Lal. In the result, he rejected the application. The judgment-debtors have come to this Court in appeal against that order.

[4] When the case came before us on the 5th instant, we thought it was pre-eminently a case for compromise and granted a short adjournment. No compromise has been arrived at.

[5] Panna Lal had examined in support of his version one Mr. Vishwanath Pande, a lawyer practising in the District Courts. The judgment-debtors had, in support of their version, examined another lawyer, Mr. Lakshmi Das Gupta also practising in the District Courts. The truth lay between these two versions, and we thought an amicable settlement would, in the peculiar circumstances of the case, be conducive to the interest of all concerned. It is, however, to be regretted that a settlement has not been possible.

[6] The learned Civil Judge has devoted considerable time and care to the case, but it is obvious that he has based his judgment largely on the statement of Mr. Vishwanath Pande. In so doing, he has discredited the version of the other lawyer, Mr. Lakshmi Das Gupta. It is true that there are circumstances, which, seemingly, tend in favour of the version of the decree-holder, but a careful analysis of the whole of the evidence principally, the probabilities of the case, tip the scale in favour of the judgment-debtors. We do not propose to follow the learned Civil Judge in accepting, at its face value, the testimony of Mr. Vishwanath Pande and rejecting altogether the testimony of Mr. Lakshmi Das Gupta. We do not propose to address ourselves in detail to their statements. We prefer to rest our decision upon the probabilities of the case and upon such evidence as fits in with those probabilities. (After considering the evidence and probabilities of the case and holding that there was a compromise his Lordship proceeded:)

[7] Dr. Sen has also contended that the vakalatnama did not confer any power upon Mr. Vishwanath Pande to come to terms on behalf of his client. In the first place, the state-



ment of Mr. Vishwanath Pande itself militates against this suggestion. He says:

"Panna Lal when I pressed told me that if he was paid Rs. 7,000 by 1-12-1944, he would accept it in total satisfaction of the decree."

Whether the initiative for the compromise came from Mr. Vishwanath Pande himself, or it was taken at the instance of his client, the fact remains that a stage was reached when Mr. Vishwanath Pande purported to act on behalf of his client and under his instructions.

[8] It is too late in the day, after the pronouncement of their Lordships in 1930 A. L. J. 489,<sup>1</sup> to contend that a specific authority to compromise is necessary. Say their Lordships at page 492:

"They are of opinion that Mr. Sircar, as an Advocate of the High Court, had, when briefed on behalf of the defendant in the Court of the Subordinate Judge of Hoogly, the implied authority of his client to settle the suit. Their Lordships have already said that he must be treated as though briefed on the trial of the suit. Their Lordships regard the power to compromise a suit as inherent in the position of an Advocate in India."

[9] We are of opinion that Mr. Vishwanath Pande had, by virtue of his position as an advocate and also because he had received definite instructions from his client, ample power to settle the dispute. We have also come to the conclusion that the story of the judgment-debtors that the matter had been compromised at a sum of Rs. 7,000 is borne out by the probabilities of the case. We might repeat that, in arriving at our conclusion, we have been influenced solely by the probabilities. We mean no aspersion upon Mr. Vishwanath Pande. Nor do we share the criticism by the learned Civil Judge of the conduct of Babu Lakshmi Das Gupta.

[10] We, therefore, allow the appeal, set aside the order of the Court below and hold that there was an adjustment of the dispute within the meaning of O. 21, R. 2, Civil P. C.

[11] We are informed by the learned counsel for the parties that the auction sale was held on 22-12-1944, and Panna Lal has withdrawn a sum of Rs. 8059-12-0 out of the sum deposited by the appellants. In view of our decision that there was an adjustment of the decree at Rs. 7,000, Panna Lal is entitled to retain only a sum of Rs. 7,000 and must refund the balance. He shall do it within a fortnight of this date.

[12] We have, on a consideration of all the facts, come to the conclusion that this is a fit case in which the parties should bear their own costs throughout.

G.N.

Order accordingly.

\*A. I. R. (34) 1947 Allahabad 383 [C.N. 144.]

VERMA C. J. AND WALI ULLAH J.

*District Board, Bijnor — Applicant v. Mohammad Abdul Salam—Opposite Party.*

Civil Revn. No. 504 of 1944, Decided on 7-1-1947, from order of Dist. Judge, Moradabad, D/- 28-7-1944.

(a) Provincial Insolvency Act (1920), S. 9 (1) (c) — Transfer of property by debtor worth more than Rs. 100 — Limitation under S. 9 (1) (c) should be counted from date of registration of sale deed and not from date of its execution.

Where the act of insolvency alleged against the debtor is the transfer by him of property worth more than Rs. 100 by a registered sale deed the limitation of three months under S. 9 (1) (c) for a petition by the creditor for adjudging the debtor as insolvent should be counted from the date of registration of the sale deed and not from the date of its execution: *Case law discussed.*

[Paras 6, 7, 11]

(b) Provincial Insolvency Act (1920), S. 9 (1) — Word "creditor" in Ss. 6 (b), 7, 9 (1) and 54 does not include person who becomes creditor of debtor after date of transfer or other act of insolvency — Such creditor cannot apply for adjudging debtor as insolvent — Word "creditor" in aforesaid sections cannot be interpreted in same sense as word "creditors" in S. 53, T. P. Act — Provincial Insolvency Act (1920), Ss. 6 (b), 7 and 54.

The word "creditor" as used in Ss. 6 (b), 7, 9 (1) and 54 does not include a person who becomes a creditor of the debtor after the date of the transfer or other act of insolvency. Hence such a creditor cannot apply for the adjudication of the debtor as insolvent: *English case law considered.*

[Para 16]

It is always dangerous to seek to construe one statute by reference to words of another. There are important differences between the law of insolvency and the provision of S. 53, T. P. Act and hence the word "creditors" in Ss. 6 (b), 7, 9 (1) and 54 cannot be construed in the same sense as the word "creditors" in S. 53, T. P. Act so as to include those becoming creditors after the transfer: 25 A. I. R. 1938 P.C. 152, *Rel. on.*

[Para 13]

A's suit against B was decreed by the trial Court. During the pendency of the appeal by B, A realised the decretal amount from B and transferred all his property to his wife by a registered sale deed. B's appeal was allowed and A's suit dismissed. In the application by B for adjudging A as insolvent on the ground that the transfer by A to his wife constituted an act of insolvency:

Held that as it was only after the transfer by A to his wife that B became a creditor of A when his appeal was allowed and A's suit dismissed, the petition by B for adjudication of A as insolvent was not maintainable.

[Para 16]

(c) Transfer of Property Act (1882), S. 53—S. 53 includes future creditors of transferor.

The term "creditors" in S. 53 includes not only creditors of the debtor at the time of the transfer, but also those who subsequently become his creditors, i. e., future creditors of the transferor are also within the scope of S. 53.

[Para 13]

('45-Com) T. P. Act, S. 53 N. 11 Pts. 3, 4.

(d) Provincial Insolvency Act (1920)—Interpretation—Applicability of English law—Basis of Indian insolvency legislation is English Law of Bankruptcy — Reference to English law on point not clarified by statute law in India is of great advantage—Interpretation of statutes.



The basis of the Indian insolvency legislation is the English law of bankruptcy. In India, as in England, the law relating to bankruptcy is essentially the creation of statute. In both countries the basis of the law is the same viz., the Roman principle of *cessio bonorum*, or the surrender by the debtor of all his goods for the benefit of his creditors in return for immunity from process. It is, therefore, not only permissible but also of great advantage to see what the English law is on a particular point which is not clarified by the provisions of the statute law in India as it is to-day. [Para 14]

(e) Provincial Insolvency Act (1920), S. 2 (1)—Word "creditor" is correlative to debtor and signifies person to whom debt i. e. liquidated or specific sum of money is due. [Para 12]

*Cases referred:—*

1. ('35) 16 Lah. 735 : 22 A. I. R. 1935 Lah. 565 : 158 I. C. 226 (F.B.), Lakhmi Chand v. Kesho Ram.
2. ('34) 58 Mad. 166 : 21 A. I. R. 1934 Mad. 637 : 151 I. C. 1054, S. Iswarayya v. Kurubasubhanna.
3. ('33) 20 A. I. R. 1933 Mad. 185 : 141 I. C. 101, Muthiah v. Official Receiver, Tinnevely.
4. ('38) 25 A. I. R. 1938 Mad. 801 : 179 I. C. 240, Venkadari Somappa v. Official Receiver, Bellary.
5. ('34) 21 A. I. R. 1934 Nag. 171 : 150 I. C. 834, Kanhaiyalal v. Sadashiv Rao.
6. ('37) 24 A. I. R. 1937 Nag. 197 : I. L. R. (1937) Nag. 403 : 169 I. C. 683, G. W. Godbole v. Marotisa Balusa.
7. ('38) 25 A. I. R. 1938 Nag. 454 : I. L. R. (1939) Nag. 377 : 178 I. C. 479, Balkisan v. Bhanu Prasad.
8. ('44) 31 A. I. R. 1944 Cal. 370, Indo Burma Traders Bank Ltd. v. Barada Charan.
9. ('38) 25 A. I. R. 1938 Cal. 417 : I. L. R. (1938) 2 Cal. 275 : 178 I. C. 727, Ramananda v. Pankaj Kumar.
10. ('34) I. L. R. (1934) 12 Rang. 263 : 21 A. I. R. 1934 Rang. 216 : 151 I. C. 670, U. Ba Sein v. Maung San.
11. ('37) 24 A. I. R. 1937 Rang. 446 : 1937 Rang. L. R. 375 : 172 I. C. 126 (F.B.), U On Maung v. Maung Shwe Hpaung.
12. ('38) 25 A. I. R. 1938 P. C. 152 : I. L. R. (1938) 2 Cal. 381 : 32 S. L. R. 502 : 65 I. A. 263 : 174 I. C. 564 (P. C.), Nippon Yusen Kaisha v. Ramjiban Serowgee.
13. (1878) 39 L. T. 361 : 48 L. J. Bk. 43 : 27 W. R. 156, In re Whelan; Ex parte Sadler.
14. (1895) 1 Q. B. 189, In re King & Beesley.
15. (1808-16) 1 Camp 489, Moss v. Smith.
16. (1927) 1 Ch. 19 : 96 L. J. Ch. 33 : 136 L. T. 182, In re Debtors (No. 669 of 1926).
17. (1870) 6 Ch. A. 516 : 40 L. J. Bk. 49 : 24 L. T. 782 : 19 W. R. 833, Ex parte Haywards.
18. (1889) 24 Q. E. D. 71 : 38 W. R. 148, In re Hecquard ; Ex parte Hecquard.

*Jagnandan Lal* — for Applicant.

*M. A. Kazmi* — for Opposite Party.

**Waliullah J.** — This is an application in revision under S. 75, Provincial Insolvency Act. It arises under the following circumstances: It appears that Mohammad Abdul Salam, the opposite party, filed suit No. 152 of 1940 for recovery of a certain amount of damages from the District Board, Bijnor, which is the applicant before us. This claim was in respect of a contract for plying a ferry granted by the District Board. On 31-10-1941 the suit was decreed for a sum of Rs. 721/4/- with proportionate costs. Against this decree the District Board filed an appeal in the Court of the District Judge. On 12-11-1942 this appeal was allowed with the

result that the suit filed by Abdul Salam was dismissed. It appears that while the appeal was pending in the Court of the District Judge, Abdul Salam in execution of his decree, realised a sum of Rs. 874/7/- from the District Board in February 1942. Thereafter, while the appeal against him was still pending in the Court of the District Judge, Abdul Salam appears to have executed a sale deed of his entire property in favour of his wife on 3-7-1942 for a sum of Rs. 800 which was only a portion of the dower debt alleged to be due to his wife. This sale deed was registered on 13-8-1942. It may be noted here that this Court on 24-7-1942 pronounced its judgment in Second Appeal No. 89 of 1941 between the District Board of Bijnor and one Mohammad Sharif. This second appeal arose in circumstances very similar to those of Suit No. 152 of 1940, instituted by Abdul Salam against the District Board, Bijnor and the High Court decided the case in favour of the District Board and against Mohammad Sharif. As mentioned above, the learned District Judge allowed the appeal on 12-11-1942, with the result that the claim of Abdul Salam stood dismissed with costs. The District Board took no proceedings for restitution under S. 144, Civil P. C. presumably because it realised that it would be difficult to recover from Abdul Salam the money which he had realised in execution of his decree.

[2] On 13-11-1942, the District Board filed a petition in the Insolvency Court under S. 7 read with S. 9, Provincial Insolvency Act, praying that Abdul Salam might be adjudged insolvent on the ground that he had committed an act of insolvency inasmuch as he had transferred the whole of his property with intent to defeat or delay his creditors within three months of the presentation of the application. At the hearing of this application, it appears, Abdul Salam as well as his counsel were absent. The application was, therefore, heard and disposed of *ex parte*. The learned Insolvency Judge held that Abdul Salam had transferred all his property in favour of his wife in order to defeat the claims of the District Board. He further held that Abdul Salam was not in a position to pay the amount due to the District Board. The application was allowed on 18-9-1943 and Abdul Salam was adjudged an insolvent.

[3] Against the order of adjudication, Abdul Salam filed an appeal in the Court of the District Judge. Two points were urged in the appeal: (1) That the petition of the creditor, i. e. the District Board was incompetent inasmuch as the act of insolvency on which it was grounded did not occur within three months before the presentation of the petition. (2) That a creditor who files a petition for adjudging his debtor an insolvent



must be a 'creditor' on the date on which the alleged act of insolvency occurred and further that he must also be a 'creditor' when he presents the petition. With regard to the first point, the learned District Judge was of the opinion that the period of three months should be counted from the date of registration of the deed and he thus came to the conclusion that the act of insolvency had occurred within three months of the date of the presentation of the petition. With regard to the second point, however, the learned Judge was of the opinion that in order to be competent to present the petition, the District Board should have been a 'creditor' of Abdul Salam on the date when the act of insolvency occurred, i. e. 13-8-1942, when the deed was registered. In view of the fact that the appeal of the District Board, reversing the decree in favour of Abdul Salam was allowed on 12-11-1942, the learned Judge came to the conclusion that the District Board was not a 'creditor' of Abdul Salam on the crucial date. In this view of the matter, the appeal was allowed and the order adjudging Abdul Salam insolvent was set aside on 28-7-1944. Against this order of the learned District Judge, the District Board, Bijnor, has come up in revision to this Court.

[4] In the first instance this application was heard by a learned single Judge of this Court who, in view of the importance of the questions involved and some conflict of authority in other High Courts, has referred it for decision by a Bench of two Judges. We have heard learned counsel for the parties at great length. There are two main questions which call for consideration and decision in this case: (1) Whether the period of three months provided for by S. 9 (1)(c), Provincial Insolvency Act should be counted from the date of the execution of deed, or from the date of registration of the same; (2) whether the debt on which the insolvency petition is founded must be due at the time when the act of insolvency is committed.

[5] Before proceeding further, reference might be made here to the relevant provisions of the Insolvency Act (Act 5 [V] of 1920).

"Section 6. A debtor commits an act of insolvency in each of the following cases, namely:—

(b) if, in British India or elsewhere, he makes a transfer of his property, or of any part thereof with intent to defeat or delay his creditors;

(c) if, in British India or elsewhere, he makes any transfer of his property, or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent; . . . . .

Section 9. (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless—

(a) the debt owing by the debtor, to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts

to five hundred rupees, and (b) the debt is a liquidated sum payable either immediately or at some certain future time, and (c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.

Section 54. (1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court."

[6] With regard to the first question it is obvious that the *terminus a quo* from which the limitation of three months begins to run is the time when the act of insolvency occurs. The crucial question, therefore, is to determine when exactly the act of insolvency occurs in a particular case. The act of insolvency alleged in the present case is a transfer of property by the debtor with a certain intent. The question at issue, therefore, resolves itself into the question when exactly the transfer of property took place. Here a written deed of sale was executed on 3-7-1942, but as the property involved was worth more than Rs. 100, the deed could operate as an effective sale deed only when it was registered. Till registration it could not have any legal effect as a sale deed. This is clear from the provisions of S. 49, Registration Act read with S. 54, T. P. Act. It follows that title to the property does not pass so long as registration is not effected. The 'transfer of property' therefore occurs only when—and not till then—registration is effected. The crucial event on which the transfer of property hinges is therefore the fact of registration. Admittedly the registration in the present case was effected on 13-8-1942. In our judgment, therefore, *the point of time* when the transfer took effect is *the point of time* when the event of registration occurred which caused the transferee to become the owner of the property. Learned counsel for the opposite party has drawn our attention to the provisions of S. 47, Registration Act. That section provides:

47. A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.

[7] Learned counsel contends that in view of the provisions of this section, as soon as registration was effected on 13-8-1942, the sale deed executed on 3-7-1942 became operative and legally effective from 3-7-1942. There is no doubt that this proposition is well founded, but in the present case, we are not concerned with the question of the 'operation' of the deed of sale; but with *the point of time when the event hap-*



opened which made the deed of sale legally effective. Care has to be taken to keep the question of the operation of the deed distinct from the question of the point of time when the event which gives it legal effect takes place. That event alone must, in our judgment, determine the commencement of the limitation of three months provided for in S. 9, Provincial Insolvency Act. On this question no decision of this Court has been brought to our notice but our attention has been drawn to several decisions of other High Courts. In 16 Lah. 735: A. I. R. 1935 Lah. 565,<sup>1</sup> a Full Bench of three learned Judges of the Lahore High Court took the same view that we are disposed to take in the present case. It was held:

"When a petition is presented alleging that a debtor has committed an act of insolvency by deed registered, the period of limitation prescribed by sub-s. 1 (a) of S. 9 of the Act runs from the date of its registration and not from the date of its execution."

Similarly, in 58 Mad. 166 : A. I. R. 1934 Mad. 637,<sup>2</sup> a Bench of two learned Judges of the Madras High Court, following an earlier decision of a learned single Judge of the same Court in A.I.R. 1933 Mad. 185<sup>3</sup> held :

"Where the act of insolvency of a debtor is the execution of a sale deed, the period of three months for presenting a petition for adjudication by a creditor commences from the date of registration of the deed and not the date of its execution."

To the same effect is the decision of two learned Judges of the Madras High Court in A. I. R. 1938 Mad. 801,<sup>4</sup> where it was held with reference to S. 54, Provincial Insolvency Act :

"For the purpose of S. 54, Provincial Insolvency Act, the date of the transfer is the date of registration and the transfer cannot be antedated by the operation of S. 47, Registration Act. Hence a deed of transfer can be impeached under S. 54, if the registration is effected within the three months next preceding the presentation of the insolvency petition, even though the execution was more than three months before presentation of insolvency petition."

[8] Again, in A. I. R. 1934 Nag. 171,<sup>5</sup> a learned Judge of the Nagpur Judicial Commissioner's Court, following the decision of the Madras High Court in A.I.R. 1933 Mad. 185<sup>3</sup> held :

"The starting point of limitation for the purpose of S. 9 (1) (c) is the date of registration of the deed of transfer, and not the date of execution."

To the same effect is the decision of Pollock J. in A. I. R. 1937 Nag. 197 : I. L. R. (1937) Nag. 403,<sup>6</sup> where with reference to S. 54, Provincial Insolvency Act, it was held :

"The limitation for presentation of an application by a creditor for adjudging a debtor insolvent on his committing an act of insolvency by effecting a transfer of his property, begins to run from the date of the registration of the deed of transfer and not from the date of its execution."

At page 198 the learned Judge observed :

"Though it is no doubt dangerous to speculate on the intention of the Legislature, it seems highly improbable that the Legislature should ever have intended that

limitation should run from the date of execution, of which the creditor had no notice, and that the debtor and his transferee should be able to defraud creditors by delaying registration for three months. Such an unreasonable construction should not readily be placed on the section."

The view taken in A. I. R. 1937 Nag. 197<sup>6</sup> was taken by another learned Judge of the Nagpur High Court, Niyogi J., in A. I. R. 1938 Nag. 454,<sup>7</sup> where it was held :

"The three months period contemplated in S. 54 runs from the date of registration of the transfer deed because it is by registration that the transfer becomes effective and the title passes from the transferor to the transferee."

At page 454 the learned Judge observed:

"It is evident that if the period of three months were taken to commence on the date of the execution of the transfer deed, then it would be open to the insolvent and the colluding creditor to defeat other creditors by merely delaying registration of the document for more than three months. The word 'transfer' means a valid and effective transfer which could only take place after registration and not by mere execution of document."

[9] Similarly, in A. I. R. 1944 Cal. 370,<sup>8</sup> two learned Judges of the Calcutta High Court, after a comprehensive review of the case law on the point, held at page 373 :

"For the purpose of S. 9, sub-section (1), cl. (c), Provincial Insolvency Act, time is to be reckoned from the date of the registration of the transfer deed, where the Transfer of Property Act requires a registered instrument for the transfer which is alleged to constitute the act of insolvency."

In an earlier case viz., A. I. R. 1938 Cal. 417 : I. L. R. (1938) 2 Cal. 275,<sup>9</sup> a Division Bench of the Calcutta High Court had taken the view that for the purpose of S. 54 the date of the execution of the deed and not the date of its registration was a material date. This view was, however, doubted in A. I. R. 1944 Cal. 370<sup>8</sup> and the case was also distinguished on the ground that it concerned S. 54 and not Ss. 9 (1) (c) and 6 (b), Provincial Insolvency Act.

[10] The view taken by the Lahore, Madras, Nagpur and Calcutta High Courts in the cases mentioned above was adopted by a Division Bench of the Rangoon High Court in I. L. R. (1934) Rang. 263.<sup>10</sup> That was a case dealing with S. 54, Provincial Insolvency Act but a Full Bench of that Court in A. I. R. 1937 Rang. 446,<sup>11</sup> has overruled the decision of the Division Bench and has held that the date of the execution of the deed is the material date. One of the learned Judges of the Full Bench, however, has remarked that different considerations may arise in considering limitation with regard to S. 9 (1) (c), Provincial Insolvency Act.

[11] In view of the decisions of different High Courts mentioned above, the preponderance of authority is clearly in favour of the view which



we are disposed to take in the present case. We accordingly hold that the period of three months must be counted from the date of the registration of the deed, namely 13-8-1942.

[12] With regard to the second question stated above viz., whether the debt on which the insolvency petition is founded must be due at the time when the act of insolvency is committed, the answer to the question turns on the proper interpretation of the expression "with intent to defeat or delay his creditors" in S. 6 (b) of the Act. The Provincial Insolvency Act in S. 2 (1) merely says that a 'creditor' includes a "decree-holder"; in terms it gives no further indication as to the significance of the word "creditor". The word "creditor" is undoubtedly correlative to debtor and signifies a person to whom a debt, i. e. a liquidated or a specific sum of money is due. But the point is whether the word "creditors" as used in the expression is necessarily confined to the "creditors" whose debt exists before the act of insolvency is committed. No decisions of any of the High Courts in India regarding this question have been brought to our notice. Learned counsel for the applicant has, however, contended that a good deal of assistance may be derived from the interpretation which has been put upon the same expression in S. 53 (1), T. P. Act. Section 53, T. P. Act runs thus:

"Every transfer of immovable property made *with intent to defeat or delay the creditors* of the transferor shall be voidable at the option of any creditor so defeated or delayed."

[13] The contention of the learned counsel is that it has been repeatedly held by High Courts in India that the term "creditors" in this section includes not only creditors of the debtor at the time of the transfer, but also those who subsequently become his creditors. There is no doubt that it is well settled that *future creditors* of the transferor are also within the scope of S. 53, T. P. Act. The law in England relating to fraudulent transfers of property, (now S. 172, Law of Property Act, 1925) on which the provisions of S. 53 (1), Transfer of Property Act are based is substantially the same but the question remains whether the interpretation put upon the expression as used in S. 53, T. P. Act, can legitimately be put upon the same expression when it occurs in the Provincial Insolvency Act. It should not be forgotten that the amendment of S. 53, Transfer of Property Act in 1929 makes it clear that sub-S. (1) of that section does not affect the law of insolvency in any way. Further there can be no doubt that the object of S. 53, Transfer of Property Act, is not to secure an *equal distribution* of the property of the bankrupt whereas the object of S. 54, Provincial Insolvency Act, is to secure an *equal distribution* of the insolvent's property among his creditors

and different consequences may flow from that distinction. It is obvious that the law of insolvency is much more stringent than the provisions of S. 53, Transfer of Property Act, e. g., a preference to one creditor which might be valid under S. 53, Transfer of Property Act would, if the debtor were adjudged insolvent within three months, be deemed fraudulent under S. 54, Provincial Insolvency Act. Similarly, a transfer by a debtor of all his property to a particular creditor is not necessarily voidable under S. 53, Transfer of Property Act, but under the Provincial Insolvency Act it may operate as an act of insolvency or at least a fraudulent preference. There are thus important differences between the law of insolvency and the provisions of S. 53, T. P. Act. In this connection reference might usefully be made to the salutary principle of interpretation indicated by their Lordships of the Privy Council in A. I. R. 1938 P. C. 152 : 65 I. A. 263.<sup>12</sup> At p. 158, their Lordships are reported to have observed:

"Decisions under other statutes have been cited. But it is always dangerous to seek to construe one statute by reference to the words of another."

In view of these considerations, in our opinion, similarity of the expressions used in the two sections is not a good ground for interpreting them in the same sense.

[14] It is beyond question that the basis of the Indian insolvency legislation is the English law of bankruptcy. In India, as in England, the law relating to bankruptcy is essentially the creation of statute. In both countries the basis of the law is the same viz. the Roman principle of *cessio bonorum*, or the surrender by the debtor of all his goods for the benefit of his creditors in return for immunity from process: *vide* Encyclopaedia of the General Acts and Codes of India, Vol. 1, p. 143. It is, therefore, not only permissible but also of great advantage to see what the English law is on a particular point which is not clarified by the provisions of the statute law in India as it is today. According to the English law the *debt* must exist before the act of bankruptcy. The law is stated thus in Halsbury's Laws of England, Hailsham Edition, Vol. 2, p. 55 :

"A person to whom a debt is due from a debtor, or who is the holder of a bill of exchange accepted by a debtor, cannot maintain a bankruptcy petition against him unless the debt came into existence or the bill of exchange was issued before the date of the act of bankruptcy on which the petition is founded: (1878) 39 L.T. 361.<sup>13</sup> But it will be sufficient for the maintenance of a petition, if the original debt due by the debtor accrued before the act of bankruptcy was committed; and the circumstance that after the commission of the act of bankruptcy the debt became merged in a judgment will not prevent the maintenance of the petition: (1895) 1 Q. B. 189.<sup>14</sup>"

In William's Law and Practice in Bankruptcy,



Edn. 15 (1937) p. 47, the law on the point is stated thus:

"By the so-called Common Law of Bankruptcy, it has always been held that the petitioning creditor's debt must have accrued due before the act of bankruptcy on which the petition is founded: (1808-16) 1 Camp. 489;<sup>15</sup> further, the debt must be a liquidated debt, though not necessarily payable *in praesenti*, before the act of bankruptcy—it is not enough that it became liquidated after the act of bankruptcy and before the petition, (1927) 1 Ch. 19,<sup>16</sup> but the debt need not have been due to the petitioning creditor at the date of the act of bankruptcy. Thus, if the debt be on a bill of exchange accepted before the act of bankruptcy, it is not necessary that it should have vested in the petitioning creditor before the act of bankruptcy . . . . . A bill of exchange accepted before the act of bankruptcy, but not issued until after it, will not support a petition: *vide* (1870) 6 Ch. A. 546<sup>17</sup> . . . . . It is submitted that this is still the law."

[15] The above statement of the law in William's well-known text book has received the approval of the Court of Appeal in England in (1927) 1 Ch. 19.<sup>16</sup> In Ringwood's Principles of Bankruptcy (1930), 16th Edition, at page 40, the law on the point is thus stated:

"The petitioning creditor's debt must have existed at the time of the act of bankruptcy; but if there was a good petitioning creditor's debt at that time it is immaterial that judgment has been subsequently obtained for it."

The reason for the rule is thus stated in the leading case in (1870) 6 Ch. A. 546<sup>17</sup> at page 549, by Mellish L. J.:

"It has always been the settled rule that the debt of the petitioning creditor must be a debt which existed at the time of the act of bankruptcy. The law was so settled, not on the ground of any express words in any of the Bankruptcy Acts, but because *it would be manifestly unjust that a person who commits an act of bankruptcy, and who happens to have no creditors, or pays all his creditors in full, should be liable to be made bankrupt on account of that act by some person to whom he afterwards becomes indebted.*"

And it is further clear that a man who is the only creditor of a debtor can present a bankruptcy petition against him: *vide* Halsbury's Laws of England, Hailsham Edition, vol. 2, p. 54 and (1889) 24 Q.B.D. 71<sup>18</sup> (per Lindley L. J. at p. 76).

[16] Sir Dinshah Mulla in his well-known book on the Law of Insolvency in British India, 1930 edition at p. 117 has stated the law thus:

The petitioning creditor's debt must have existed at the time of the act of insolvency. It must also have existed at the time of the presentation of the petition, and must have continued to exist at the hearing and down to the making of the order of adjudication. If there was a good petitioning creditor's debt at the time of the act of insolvency, it is immaterial that judgment has been subsequently obtained for it and it has become merged in the judgment."

Similarly, in the Encyclopaedia of the General Acts and Codes of India, vol. 1 at pages 167 and 250, the law is thus stated:

"The petitioning creditor's debt must have been subsisting when the act of insolvency was committed: (1808-16) 1 Camp. 489<sup>15</sup> and (1871) 6 Ch. A. 546.<sup>17</sup>

In view of the authorities mentioned above, it

must be held that the word "creditors" as used in sections 6 (b), 7, 9 (1) and 54, Provincial Insolvency Act does not include a person who becomes a creditor of the insolvent after the date of the transfer or other act of insolvency. It follows, therefore, that the District Board, the applicant in this case, which became a creditor of Abdul Salam only when the appeal was allowed and the suit dismissed on 12-11-1942 was not competent to file the petition on 13-11-1942. The result, therefore, is that the application in revision is dismissed with costs.

G.N.

*Application dismissed.*

**A. I. R. (34) 1947 Allahabad 388 [C. N. 145.]**  
SINHA J.

*Ram Sahai—Defendant—Appellant v. B. Hari Shanker and another — Plaintiffs—Respondents.*

Second Appeal Nos. 1166 and 1574 of 1944, Decided on 29-11-1946, from decision of Addl. Civil Judge, Bulandshahr, D/-18-3-1944.

Custom—Landlord and tenant—Right of transfer—Restraint.

Where a custom depriving a *ryot* of his absolute right of transfer is pleaded to prevail in a part of a town, judicial decisions constitute the most satisfactory evidence of it: 26 A.I.R. 1939 P.C. 22, *Ref.* [Para 10]

According to the custom prevalent in Sarai Goshain, which forms part of the town of Bulandshahr (U.P.) a *ryot* has no right to sell his interest in land without the knowledge of his landlord. [Para 13]

*Case referred :—*

1. (39) 1939 A. L. J. 264 : 26 A. I. R. 1939 P.C. 22 : I. L. R. (1939) Kar. 98 : 179 I.C. 620, Ajai Verma v. Mt. Vijai Kumari.

C. B. Agarwala—for Appellant.

**Judgment.** — These are two appeals by the defendants and arise out of two suits for possession. The property in dispute consists of two plots Nos. 1175 and 1177. Plot No. 1175 is a compound known as Narotamwala. The plaintiffs claimed to be their owners. Their case is that a portion of the land was sold by the plaintiffs, but the bulk of it still remains with them. The complaint is that Tullan, son of Kundan and grandson of Narotam, occupied a house as their *ryot*, but sold it, without any right, on 14-3-1933, to the defendant, Ram Sahai, without their knowledge. They claimed possession of the land on the ground that, according to the custom prevalent there, the transaction was not permissible. The defence was that there was no such custom and that Tullan had an absolute right of transfer. This was suit No. 451 of 1941. The connected suit against Chhote was brought on similar allegations and was resisted on similar pleas.

[2] The property in dispute lies in a part of the town of Bulandshahr, known as Sarai Goshain. The learned Munsif found that the



plaintiffs had failed to prove that the plots in dispute lay within their land or that they were their owners. He also found that the custom pleaded by the plaintiffs did not exist. In the result, he dismissed both the suits.

[3] On appeal, the learned Additional Civil Judge disagreed with the learned Munsif on both the points. He found that the plots in dispute lay within the ambit of the plaintiffs' proprietary rights. He also found that the custom prevailed in the locality. The defendant has come to this Court in second appeal.

[4] I have heard the learned counsel for the appellant at great length and have given my anxious consideration to the case. I have come to the conclusion that the judgment under appeal is correct and must stand.

[5] Bulandshahr is one of the towns in these provinces. Sarai Goshain was founded about two hundred and seventy years ago. The learned Munsif found that it is not an agricultural village and has all the appearances of a mohalla inhabited by lawyers, doctors and others, who flourish in a town or a city. He also found that this mohalla was never distinct or separate from the town of Bulandshahr. He further found that Bulandshahr itself was converted into a municipality in the year 1866. These were the reasons which weighed with him in coming to his conclusion that such a custom could not prevail in the particular area.

[6] The learned Additional Civil Judge, however, found that, in view of the entry in the *wajib-ul-arz* and in view of a number of judgments on the record, the custom must be deemed to be established. I have no doubt in my mind that this conclusion is correct.

[7] The *wajib-ul-arz* consists of three sections. The first relates to houses belonging to ancient owners, the second to *ryots* settled by zamindars or inns and miscellaneous houses; the last portion deals with the resumed muafi, nazul, etc., etc.

[8] It appears to me that the trial of the case proceeded on the assumption that the house in dispute fell in the second category and it is not open to the learned counsel for the appellant to go back on that position.

[9] It is contended by him that it was admitted by the plaintiff in his deposition that the Sarai in question was never separate from the town of Bulandshahr and it was not open to the lower appellate Court to spell out a new case. I shall assume that he is right and the description of the place given by the learned Munsif is a true description. I, however, feel that the judgments hold the field. Not by mere presumptions raised by the physical features, the history or geography of the place, could the

scale be turned in favour of the defendant. He should have led positive evidence, but this he has failed to do.

[10] It cannot be denied that judicial decisions constitute the best evidence in a case of such a character. In Roy's Customs and Customary Law in British India (1911) at page 580 it is said:

"Though judicial decisions are not necessary for the establishment of a custom, yet they are certainly the most satisfactory evidence of it. Instances of an enforcement of a custom are good evidence..."

Indeed their Lordships of the Judicial Committee in a case which went from this Court, 1939 A. L. J. 264,<sup>1</sup> have gone the length of holding that "the proof of actual instances of such a custom taking effect is not necessary."

[11] The plaintiffs in this case stand on surer ground by placing before the Court a large number of instances in which the custom pleaded by them has been recognised in judicial decisions.

[12] It is not necessary to deal with all the judgments on the record. I shall allude to just a few. They range from a period between 1906 and 1941. The first judgment is of 28-11-1906. It is a judgment by a Munsif. It was a case of a sale by a ryot in this very mohalla. The second is a judgment of 4-3-1908. It is again a case of a sale. The third is a judgment of 17-2-1920. The facts of the case do not seem to be clear, but the trend of the judgment indicates that the custom was upheld. The last judgment is of 30-3-1936.

[13] I have made no reference to a number of other judgments, which deal with the question of abandonment, inasmuch as the learned counsel for the appellants contends that they cannot afford a proper guide for the determination of the question in hand, although the contention does not necessarily command my assent. The area in dispute may not be an agricultural area, but the question still remains whether it possesses some of the incidents of an agricultural village, one of them being prohibition against transfer by a ryot. The instances, which deal with the case of a transfer by a ryot are quite enough to establish the custom. I am of opinion that, if there were no other evidence on the record than the judgments referred to, which are all in favour of the custom, the plaintiffs must be deemed to have discharged the burden of proof. As against this the defendants have, as I have already said, nothing to fall back upon except presumptions.

[14] I think the view taken by the Court below is right and I dismiss the appeals, but, as the respondents have not entered appearance, I make no order as to costs. Leave to appeal under the Letters Patent is refused.

V.B.B.

Appeals dismissed.



A. I. R. (34) 1947 Allahabad 390 [C. N. 146.]

VERMA AND BIND BASNI PRASAD JJ.

*Ajudhia Prasad—Judgment-debtor — Appellant v. The U. P. Government — Decree-holder—Respondent.*

Ex. Second Appeal No. 1044 of 1945, Decided on 25-7-1946, from decision of 2nd Civil Judge, Muzaffarnagar, D/-3-1-1945.

(a) Limitation Act (1908), Art. 182 — Abatement of appeal—Starting point of limitation.

An order declaring an appeal to have abated is in effect an affirmation of the decree of the Court below and amounts to a final order within the meaning of Art. 182 and therefore limitation begins to run against the decree-holder from the date of such order and not from the date of the decree under appeal: 28 A. I. R. 1941 All. 371, *Rel. on*; 1 A. I. R. 1914 P. C. 65 and 1 A. I. R. 1914 P. C. 66, *Disting.* [Para 3]

('42-Com.) Lim. Act, Art. 182, Note 41.

(b) Limitation Act (1908), Art. 182—"Appeal" includes revision.

The word "appeal" should not be interpreted in the narrower sense of the term as used in the Code of Civil Procedure. The word "appeal" occurring in Art. 182 includes revision: 24 A. I. R. 1937 Mad. 385 (F. B.) and 27 A. I. R. 1940 Mad. 281, *Rel. on*; 19 A. I. R. 1932 P. C. 165, *Ref.* [Para 4]

('42-Com.) Lim. Act, Art. 182, Note 33 pt. 1.

(c) Civil P. C. (1908), S. 2 (3) and O. 27, Rr. 8 and 9 (Allahabad)—Government incurring costs in defending public officer has interest in suit and is entitled to be reimbursed if the defence prevails—Suit against Government officer dismissed—Decree directing costs of suit to be paid to Government—On Government officer's death, Government as decree-holder held entitled to apply for execution of decree for realisation of costs from plaintiff. [Paras 7 & 9]

(d) Civil P. C. (1908), S. 2 (3)—Decree-holder.

A decree-holder need not be a party to the suit A person in whose favour an order capable of execution is made would be a decree-holder: 19 A. I. R. 1932 Mad. 193, *Ref.* [Para 9]

('44-Com.) C. P., C. S. 2 (3) N. 2.

*Cases referred:—*

1. ('41) 1941 A. L. J. 480 : 28 A. I. R. 1941 All. 371 : I. L. R. (1941) All. 658 : 197 I. C. 800, *Murlidhar v. Mahabir Singh.*
2. ('14) 36 All. 284 : 1 A. I. R. 1914 P. C. 65 : 41 I. A. 104 : 23 I. C. 644 (P. C.), *Batuk Nath v. Mt. Munni Dei.*
3. ('14) 36 All. 350 : 1 A. I. R. 1914 P. C. 66 : 23 I. C. 649 (P. C.), *Abdul Majid v. Jawahir Lal.*
4. ('32) 1932 A. L. J. 643 : 19 A. I. R. 1932 P. C. 165 : 59 I. A. 283 : 60 Cal. 1 : 137 I. C. 529 (P. C.), *Nagendra Nath De v. Suresh Chandra De.*
5. ('37) I. L. R. (1937) Mad. 616 : 24 A. I. R. 1937 Mad. 385 : 168 I. C. 561 (F. B.), *Chidambara Nadar v. Rama Nadar.*
6. ('40) 27 A. I. R. 1940 Mad. 281 : 189 I. C. 185, *Krishnamachari v. Changalraya Naidu.*
7. ('32) 19 A. I. R. 1932 Mad. 193 : 136 I. C. 771, *Vythilinga Pandarasannadhi v. Thiagarajaswami Devasthanam.*

*A. P. Pandey—for Appellant.**Brijlal Gupta—for Respondent.*

**Bind Basni Prasad J.** — This is a second appeal from an order of the Second Civil Judge, Muzaffarnagar, dismissing an appeal against

the order of the Munsif of Muzaffarnagar passed in an execution proceeding. The facts are as follows: Ajudhia Prasad appellant brought a suit for the recovery of Rs. 600 against Munshi Abdul Hakim Tahsildar as damages for an alleged wrongful arrest. The suit was dismissed by the trial Court on 17-12-1936, and the operative order of the trial Court was as follows:

"The plaintiff's suit for damages is dismissed with costs. The defendant shall get from the plaintiff Rs. 200/- as compensatory costs, Rs. 41/-, the unpaid costs of adjournment and the usual costs for the suit. The entire costs with the exception of Rs. 20/- out of the costs of adjournment (which shall be paid to the Government Pleader) shall go to the Government."

[2] There was an appeal against that order and it was dismissed on 31-5-1938. Then there was a revision to this Court. During the pendency of the revision the defendant died on 4-6-1939. There was no substitution of heirs in place of the defendant and on 22-12-1939, orders were passed by this Court that the revision had abated. On 4-9-1942, an application for the execution of the decree was made by the U. P. Government. The plaintiff judgment-debtor then filed an application raising the following two points: (1) That the application for execution was time barred and (2) that the U. P. Government had no right to apply for execution. Both these contentions have been repelled by the two Courts below and the judgment-debtor, therefore, comes in appeal to this Court.

[3] I take up first the question of limitation. The argument on behalf of the appellant is that there was an automatic abatement of the proceedings on the death of the defendant on 4-6-1939 and, as the application for execution was made more than three years from that date, it is time-barred. No doubt as the law is, there was an automatic abatement on 4-6-1939, but where there has been an order of the Court declaring an appeal to have abated, the period of limitation under Art. 182, Limitation Act should be reckoned from that date. In support of this view there is a decision of this Court in 1941 A. L. J. 480.<sup>1</sup> All the relevant authorities on the point have been discussed in it. Learned counsel for the appellant contends on the basis of the Privy Council rulings, 36 ALL. 284<sup>2</sup> and 36 ALL. 350,<sup>3</sup> that the order of the Court declaring the appeal to have abated was a ministerial order and not a judicial one. These two rulings have been considered in 1941 A. L. J. 480<sup>1</sup> and it was held that an order declaring an appeal to have abated is in effect an affirmation of the decree of the Court below and amounts to a final order within the meaning of Art. 182, Limitation Act and therefore limitation begins to run against the decree-holder from the date of such order and not from the date of the decree under



appeal. Moreover neither in 36 ALL. 284<sup>2</sup> nor in 36 ALL. 350<sup>3</sup> was there any question of an order of abatement. The order with which their Lordships of the Judicial Committee were concerned in those two cases was an order of dismissal of appeals for want of prosecution. I cannot extend the principle laid down in those two cases to the facts of the present case which are quite different.

[4] It has been argued by learned counsel for the appellant that according to Art. 182 limitation begins to run from the date of the decree passed by the Court of the first instance or by the Court of appeal but not by the Court of revision. It is unnecessary to dilate upon this point. In 1932 A. L. J. 643<sup>4</sup> their Lordships of the Judicial Committee observed as follows:

"There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent."

In the Full Bench case in I.L.R. (1937) Mad. 616<sup>5</sup> and in A.I.R. 1940 Mad. 281<sup>6</sup> it was held that the word 'appeal' occurring in Art. 182 includes revision. The word 'appeal' should not be interpreted in the narrower sense of the term as used in the Code of Civil Procedure.

[5] In view of these authorities it is clear that the limitation for the application for the execution of a decree should be reckoned in the present case from 22-12-1939, when the formal order for the abatement was passed by this Court. The application dated 4-9-1942 was thus in time. I agree with the view taken by the two Courts below.

[6] The second point is whether the U. P. Government has a right to execute the decree. Order 27, R. 8, Civil P. C., lays down the procedure in suits against public officers. Sub-rule (1) of R. 8 provides that:

"Where the Government undertakes the defence of a suit against a public officer, the Government Pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits."

Sub-rule (2) provides that:

"Where no application under sub-r. (1) is made by the Government Pleader on or before the date fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties."

There is R. 9 which has been added by this Court and which runs as follows:

"In every case in which the Government Pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of R. 8 (1), the defence of a suit against an officer of the Government, he shall, in lieu of a vaklatnama, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall as nearly as may be, in the term of the following form:

Title of the suit, etc.

I, A. B., Government Pleader, appear on behalf of the Secretary of State for India in Council or the Government of the United Provinces, or as the case may be, respondent, in the suit or, on behalf of the Government which under O. 27, R. 8 (1) of Act No. 5 of 1908, has undertaken the defence of the suit. . . ."

[7] It is obvious from the provisions of Rr. 8 and 9 of O. 27 that there is a statutory recognition of the undertaking of the defence of a public officer by the Government. In other words, it is not a private matter between an employer and an employee that the former undertakes the defence of the latter, but it is in pursuance of a provision of law that the Government may undertake the defence of its employee. When the Government in pursuance of this law incurs costs in defending a public officer it has, in a sense, an interest in the suit and by implication it is entitled to be reimbursed of the costs incurred in the defence, if the defence prevails. It was obviously for these considerations that the trial Court in passing the decree ordered that the costs incurred in the defence of the suit shall be payable to the Government. It cannot be denied that under the decree the Government has been given a right to realise the decreed costs. Now when there is a right there must be a remedy. The argument on behalf of the appellant that the right conferred by the decree is without remedy is untenable.

[8] Learned counsel for the appellant refers to the definition of the terms 'decree' and 'decree-holder' as contained in sub-ss. (2) and (3) of S. 2, Civil P. C. He contends that as the United Provinces Government is no party on the record, it is not entitled to execute the decree and in this connection he relies upon the fact that a decree can be only between the parties to a suit. It is unnecessary to discuss the definition of the term 'decree' because whether or not the order relating to the payment of the costs to the U. P. Government passed by the trial Court was a decree, the U. P. Government is certainly a decree-holder. The term 'decree-holder' has been defined to mean

"any person in whose favour a decree has been passed or an order capable of execution has been made."

Now it is clear from this that a person in whose favour an order capable of execution has been made is also a decree-holder. It is also evident from this definition that a decree-holder need not be a party to the suit. He may be 'any person.' The term 'order' has not been defined with reference to the parties to the proceeding. Its definition as contained in sub-s. (14) of S. 2, Civil P. C., is as follows:

"Order means the formal expression of any decision of a Civil Court which is not a decree."

[9] Assuming, therefore, that that portion of the operative order of the trial Court which provided for the payment of the costs to the



U. P. Government was not a decree, it was certainly an "order" and was no doubt capable of execution. The U. P. Government is, therefore, a decree-holder as defined in sub-s. (3) of S. 2, Civil P. C. In this connection I may refer to the case in A. I. R. 1932 Mad. 193,<sup>7</sup> in which it was held that a decree-holder need not be a party to the decree. It is enough if the decree confers some right enforceable under the decree upon some person mentioned in it. The U. P. Government, having undertaken the defence in pursuance of R. 8 of O. 27 for the defendant, should by implication be deemed to have been a party to the proceedings. It was given a right to realise the costs incurred by it from the plaintiff. I cannot go behind the decree in the execution proceedings. The defendant himself being dead, the U. P. Government is, in my opinion, in justice, entitled to realise the costs decreed in its favour. I agree with the view taken by the two Courts below. I would, therefore, dismiss the appeal.

**Verma J.**—I agree with my learned brother in holding that the appeal is without force and should be dismissed.

**By the Court.**—The appeal is dismissed with costs.

N.S.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 392 [C. N. 147.]**

YORKE J.

*Dubey Ram Shankar — Applicant v. Emperor.*

Criminal Revn. No. 1330 of 1946, Decided on 22-11-1946, from order of Sessions Judge, Farrukhabad, D/- 29-6-1946.

Criminal P. C. (1898), S. 107—Faction leaders.

Persons who are behind the actual breakers of the peace as abettors or instigators for example, leaders or controllers of a faction, are persons in whose cases orders under S. 107 may properly be made on the view that they are persons who are likely to do a wrongful act that may probably occasion a breach of the peace: 8 I. C. 818 (All.) and 26 A. I. R. 1939 Lah. 363, *Rel.* on. [Para 2]

(46 Com.) Cri. P. C., S. 107, Note 10, Pt. 15.

*Cases referred :—*

1. (10) 7 A. L. J. 1161: 8 I. C. 818, Jagat Narain v. Emperor.
2. (39) I. L. R. (1939) 20 Lah. 554; 26 A. I. R. 1939 Lah. 363: 184 I. C. 279, Mahomed Abdul Qayum v. Emperor.

*R. N. Verma*—for Applicant.

*Deputy Government Advocate*—for the Crown.

**Order.**—This is an application in revision by one Dubey Ram Shankar who has been bound over under S. 107 by a Magistrate of the Farrukhabad district. The case for the prosecution put very shortly is that there were two parties in the town of Chhibramau, the leaders of which were, on the one side, Tewari Radhey Govind and, on the other, Dubey Ram Shankar. It was said that there was bitter enmity between the two parties, that there had been acts involving breaches of

the peace in the past and that there was a serious apprehension of a breach of the peace from both parties in future. Notices were accordingly issued not only to the applicant and some other members of his party but also to the members of Tewari Radhey Govind's party, and members of both parties were ultimately bound over. In the present application the point taken is:

"that on the Court's own finding that the applicant himself has not committed any act of violence and is not likely to commit any act of violence or disturb the public tranquillity, no case has been made out under S. 107, Criminal P. C., and the Courts below have erred in law in demanding security from the applicant."

Now it is perfectly true that the learned Sessions Judge who dealt with the appeals of both parties in a single omnibus judgment, although he dealt with the details of each case separately, remarked at the end of his judgment:

"The two leaders of the parties must be bound down though they themselves have not committed any act of violence and are not likely to commit any act of violence or disturb the public tranquillity. But they are the ring leaders and while remaining behind the scene they instigate their hirelings to commit breach of the peace; it means that he does a wrongful act likely to commit breach of the peace. Therefore such ringleaders come within the purview of S. 107, Criminal P. C."

The learned Sessions Judge proceeded to refer a number of cases. The two leading cases so far as I am able to see on this point are the decision of Chamier J. in 7 A. L. J. 1161<sup>1</sup> and the Lahore decision in 20 Lah. 554.<sup>2</sup> From the later case I will only take a few words from the headnote which runs as follows:

"It is the individual who is contemplated in the S. 107 and it is the individual act that may be brought home to him. The only case in which a person can be punished for the wrong done by others (that is, here, be bound since S. 107 does not involve punishment) is where he abets or instigates the offence. Failing that, no person can be visited with any penalty for the acts done by others on whom he has no control and for whose conduct he cannot be held responsible."

Inferentially if there is any evidence that a person has control over others and that he can be held responsible for their conduct and there is an apprehension of breach of the peace from those persons, then such person can also be bound over.

[2] The matter was dealt with at a greater length in 7 A. L. J. 1161<sup>1</sup> and the learned Judge remarked:

"It is a common and I think a proper practice to take security from the leaders of opposing factions that are shown to be likely to commit breaches of the peace. It is very often impossible to bind over all the members of two or more parties. But before a person is bound over to keep the peace, it must be shown that he is himself likely to commit a breach of the peace or do a wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity."

Such an act, I suppose, would be the abetting or instigating to commit a breach of the peace by others. On the following page 1164, the learned Judge remarked.



"Having examined the evidence, I agree with the Sessions Judge that it is not proved that the three persons who have been bound over are likely to commit a breach of the peace themselves or that they are leaders of the two parties in the sense that they can control other members of their respective parties." He concluded by referring to some evidence about which he remarked:

"This shows that they have no real control over the party to which they belong and that they do not belong to the most bigoted section of that party."

In the light of these decisions, it appears to be clear that although in the ordinary way the person who can be bound over under S. 107 is the individual from whom there is an actual apprehension of a breach of the peace, nonetheless it is clearly recognised that other persons who are behind the actual breakers of the peace as abettors or instigators, for example leaders or controller of a faction are persons in whose cases orders under S. 107, may properly be made on the view that they are persons who are likely to do a wrongful act that may probably occasion a breach of the peace.

[3] The question then arises whether in the present case that is a proper conclusion in regard to the applicant. The learned Sessions Judge had held in clear terms that the applicant is a ring leader and I understand from the form of the finding that he is definitely of the view that the applicant is a person who has some control over the other members of his party. I have glanced at the evidence. There is not a great deal of it, but there is something to show that he is the leader of one faction and I think the Courts below were justified in taking the view that he can exercise a degree of control over other members of his faction. In these circumstances, I think the order binding over the applicant was justified and was good in law. I therefore dismiss this application.

R.G.D.

*Application dismissed.*

**A. I. R. (34) 1947 Allahabad 393 [C. N. 148.]**

RAGHUBAR DAYAL J.

*Kunwar Pal — Applicant v. Emperor.*

Criminal Revn. No. 1719 of 1946, Decided on 18-3-1947, from order of Sessions Judge, Aligarh, D/- 1-12-1946.

(a) Criminal P. C. (1898), S. 288 — What amounts to admission of evidence under section.

The mere fact that the statements made by the witness in the committing Magistrate's Court were put to the witness in the trial Court by the public prosecutor while cross-examining the witness would not justify the conclusion that the trial Court thought it desirable to treat the statements as evidence under S. 288.

[Para 3]

('46-Com.) Cr. P. C. S. 288 N. 9.

(b) Criminal P. C. (1898), S. 288 — Statement by witness before committing Magistrate — Use of, by appellate Court — Procedure.

Where the statement of a witness in the committing Magistrate's Court is not treated as evidence under

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S. 288 in the trial Court, assuming that the appellate Court can treat such evidence as good evidence, it (assuming that they can be so treated) must be treated as additional evidence and its use should be after affording an opportunity to the parties to question the witness about the statement after knowing full well that the statement might be used as substantive evidence.

[Para 3]

But where a witness admits in the appellate Court that his statement in the committing Magistrate's Court was true, the statement can be used in the appellate Court.

[Para 3]

('46-Com.) Cr. P. C., S. 288 N. 9.

(c) Penal Code (1860), S. 376 — Statement of girl when sufficient for conviction.

No doubt a mere statement of the girl that the accused had raped her should not be treated as sufficient for recording a conviction under S. 376. But where the girl identified the accused in jail and did not accuse him of the offence by name and there was no suggestion that the girl or any other prosecution witness knew him from before:

*Held* that the accused might be convicted: 29 A. I. R. 1942 Bom. 121 (F.B.), *Disting.*

[Paras 2, 4]

(d) Penal Code (1860), S. 376 — Sentence — Offence not to be lightly treated — Accused 14 years of age — Sentence of two years rigorous imprisonment and ten stripes held proper.

[Para 5]

*Cases referred:—*

1. ('42) 29 A. I. R. 1942 Bom. 121: 200 I. C. 261 (F.B.), *Emperor v. Mahadeo Tatyia.*

2. ('46) 33 A. I. R. 1946 All. 191: 224 I. C. 366, *Ramkala v. Emperor.*

*J. N. Chatterji* — for Applicant.

*Deputy Government Advocate* — for the Crown.

**Order.** — This is a revision by Kunwar Pal against his conviction under S. 376, I. P. C. Kunwar Pal was not named as an accused in the first information report. He was identified by Mst. Daropa the victim of the alleged rape, in jail. Phula P. W. 8 did not identify him in jail but accused him of committing the offence in the Court of the Assistant Sessions Judge. His statement has not been relied upon by the Sessions Judge who heard the appeal against the conviction of the accused. Ram Singh and Mahabir did not depose against the accused in the Court of the Assistant Sessions Judge. They made statements against the accused in the Court of the committing Magistrate. Ram Singh stated in the trial Court that he did not know what statement he made before the committing Magistrate and that he had received two annas from the police, and as a result he stated what he was asked to state. Mahabir does not say anything of the kind. He stated that he did not remember his statement before the committing Magistrate but whatever statement he made that was a true statement. He also stated that the police gave him and another boy two annas each before the Sub-Inspector recorded the statements of the boys. The statements of these two boys made before the committing Magistrate were put to them and are Exs. P. 8 and P. 9. The



learned Assistant Sessions Judge did not rely on these two boys. The learned Sessions Judge accepted their statements before the committing Magistrate to be true. The result is that the learned Assistant Sessions Judge convicted the accused relying on the statements of Mst. Daropa and Phula while the learned Sessions Judge maintained the conviction by relying on the statement of Mst. Daropa and the statements of Ram Singh and Mahabir before the committing Magistrate.

[2] Learned counsel for the applicant has challenged the conviction on two grounds. The first is that the girl's own statement is not treated as sufficient for recording a conviction in a case under S. 376, I. P. C. Reliance is placed on the case reported in A. I. R. 1942 Bom. 121.<sup>1</sup> In fact the rule of prudence laid down is considered to be a good rule by most of the Courts. The case, however, is distinguishable as in the present case it is not a mere statement of the girl that the accused had committed the offence but it is her identifying the accused in jail. The element of making a false statement does not come in. There is nothing on the record to indicate that she must have known or had an occasion to know the accused. Enmity between the family of the accused and the complainant's family was alleged. Even if the allegation be correct, it does not necessarily follow that the girl must have known the boy from before. It is significant that the accused did not state at the time of the identification proceedings that the girl or any other witness knew him. The second point urged is that the accused was not medically examined and, therefore, necessary corroboration as contemplated in the case reported in A. I. R. 1946 ALL. 191<sup>2</sup> is not available. The accused was arrested after over two months of the commission of the incident. No such medical evidence could have been available.

[3] The statement of Phula has been rightly ignored by the learned Sessions Judge when he did not identify the accused in jail. The learned Sessions Judge has relied on the statements of Ram Singh and Mahabir made before the committing Magistrate. There is nothing on the record to indicate that these two statements were taken on record by the learned Assistant Sessions Judge under S. 288, Criminal P. C. The statements, as already noted, were put to these witnesses but it was in the course of their cross-examination by the public prosecutor. This mere fact, therefore, would not justify the conclusion that the learned Assistant Sessions Judge thought it desirable to treat these statements as evidence under S. 288, Criminal P. C. It is argued for the Crown that it was not necessary to record it clearly that the

statements were being taken on record under S. 288, Criminal P. C., and that even if the trial Court did not act under that section the appellate Court could have acted under S. 288, Criminal P. C. and treated the statements in the Court of the committing Magistrate as good evidence. Without deciding this question about the powers of the appellate Court to act under S. 288, Criminal P. C., it stands to reason that if the statements are to be so used they must be treated as additional evidence and their such use should be after affording an opportunity to the parties to question the witnesses about those statements after knowing full well that those statements might be used as substantive evidence. I am, therefore, of opinion that the learned Sessions Judge was probably not right in relying on the statements recorded before the committing Magistrate by treating them as evidence under S. 288, Criminal P. C. I, however, think that the statement of Mahabir in the committing Magistrate's Court could be used as Mahabir had admitted in the Sessions Court that what he stated before the committing Magistrate was a true statement. Such a statement means that he ultimately stuck to that statement. It was not necessary for him to have repeated the whole statement again.

[4] I am, therefore, of opinion that there is no good reason to ignore the statement of Mt. Daropa in this particular case as she identified the accused and did not accuse him of the offence by name and which could have been possibly due to enmity. Her statement finds support from the statement of Mahabir in the Court of the committing Magistrate and which statement Mahabir admitted to be true when cross-examined by the public prosecutor in the Sessions Court. It follows that the conviction of the applicant is, therefore, correct.

[5] The accused has been sentenced to two years rigorous imprisonment and ten stripes. The sentence is urged to be excessive in view of the applicant's age which is 14 years. The offence of rape is not to be lightly treated and I do not consider that the sentence requires any particular reduction. Accordingly I reject this revision.

G.N.

*Application rejected.*

**A. I. R. (34) 1947 Allahabad 394 [C.N. 149.]**

MULLA AND YORKE JJ.

*Chhotey — Applicant v. Emperor.*

Criminal Ref. Nos. 77, 78, 79, 80 and 81 of 1946. Decided on 16-12-1946, from order of Sessions Judge, Shahjahanpur, D/- 8-1-1946.

(a) Defence of India Rules (1939), R. 81 (4) — Cotton Cloth and Yarn Control Order (1943), Cls. 14 and 15A.



After the amendment of Cl. 14, Cotton Cloth and Yarn Control Order by Notification No. T. B. (1), 29/44 D/- 4-11-44 and before the amendment of Cl. 15A by Notification No. T. B. (1) 33/45 D/- 13-1-45 the position was that while Cl. 14 had been amended so as to make mere possession of cloth specified in the Clause after 31-12-1944 an offence, Cl. 15A still stood in the form in which it was introduced by Notification No. 36-*Tex. S.* (1) 13/43 D/- 22-1-44 after the amendment of Cl. 14 on 4-11-1944 Cl. 15A could have no application to it and was indeed a dead letter. The provisions of Cl. 14 could not be governed or controlled by Cl. 15A prior to its amendment on 13-1-1945 : 32 A. I. R. 1945 Nag. 249 and 33 A. I. R. 1946 Oudh 234, *Dissent*.

[Para 4]

(b) Defence of India Rules (1939), R. 81 (4) — Cotton Cloth and Yarn Control Order (1943), Cl. 15A — Construction.

Clause 15A must be read as a whole and cannot be anything more than a proviso to Cl. 14 and an accused person who claims the benefit of that proviso must bring his case clearly within its purview by establishing that he had fulfilled the conditions prescribed by the Textile Commissioner under which alone possession of cloth was permissible in spite of the provisions of Cl. 14.

[Para 5]

(c) Defence of India Rules (1939), R. 5 — Applicability.

Rule 5, Defence of India Rules is intended to enlarge the scope of contravention and not to limit or curtail it. It is intended to widen the field of contravention by including within its ambit an act which though it may not be a *prima facie* breach of any provision is yet an evasion or an attempt to evade that provision. The Rule has no application to an act which is a clear and direct breach of a prohibitory provision: 32 A. I. R. 1945 Nag. 249, *Dissent*.

[Para 11]

#### Cases referred—

1. ('45) 32 A. I. R. 1945 Nag. 249, I. L. R. 1945 Nag. 909, Provincial Govt., C. P. & Berar v. Shamsheer Ali.
2. ('46) 1946 A. W. R. C. C. 97: 33 A. I. R. 1946 Oudh 234 : 224 I. C. 384, Murlidhar v. Emperor.
3. Cri. Revn. No. 513 of 1946, D/- 5-8-1946, Pitambar Lal v. Emperor.
4. Cri. Revn. No. 602 of 1946, D/- 5-8-1946, Nandeswar Prasad v. Emperor.
5. Reported in ('47) 34 A. I. R. 1947 All. 250 : 228 I. C. 155, Ram Sarup v. Emperor.

Jagdish Sahai — for Applicant.

Deputy Govt. Advocate — for the Crown.

**Mulla J.** — These are five cases referred to this Court by the learned Sessions Judge at Shahjahanpur with an order of reference common to them all because in each case only one and the same question of law arises for consideration. Five dealers in cloth at Shahjahanpur, namely, Chhotey, son of Nanhoon, Chhotey Lal, son of Ganga Ram, Brahma Swarup, Abdul Salam and Jagan Nath, were tried separately for an offence under R. 81 (4), Defence of India Rules for having contravened cl. 14 (1), Cotton Cloth and Yarn (Control) Order of 1943. The trial in each case was summary. The prosecution alleged that the shops of these five dealers were visited by an Inspector of the Textile Department on different dates between 1st and 10th January 1945, with the result that a certain quantity of cloth, which in view of cl. 14, Cotton Cloth and Yarn

(Control) order of 1943 could not be legally possessed beyond 31-12-1944, was recovered from each shop. In each case it was specifically stated in the complaint that the cloth recovered fell within the purview of cl. 14 (1) (a) or (b) and could not, therefore be legally possessed by any dealer after 31-12-1944. The Inspector, who visited the shop in each case, definitely stated in his evidence at the trial that the cloth recovered was cloth which could not be legally possessed by any dealer after 31-12-1944. The factum of the recovery of cloth in the circumstances alleged by the prosecution was not denied in any case, but the plea taken in each case was that the cloth had remained unsold and no instructions had been issued by the authorities for disposal of such cloth. All the five cases resulted in conviction and the sentence imposed by the trying Magistrate in each case was a fine proportionate to the quantity of the cloth recovered and an order forfeiting the cloth in respect of which the offence had been committed. The sentences being non-appealable, the five convicted persons went up in revision before the learned Sessions Judge at Shahjahanpur who has made the references now before us. The learned Sessions Judge arrived at the conclusion that the Cotton Cloth and Yarn (Control) Order being defective, inasmuch as it did not provide for the disposal of cloth which could not be possessed by any dealer beyond 31-12-1944, cl. 14 of the said Order involved a great hardship on the dealers concerned. He has accordingly recommended in each case that the sentence of fine should be reduced to a nominal sum of Rs. 5 and the order of forfeiture of cloth should be set aside.

[2] Learned counsel for the convicted persons have however, strenuously contended in each case that this Court should record a finding of acquittal. The contention is based upon a decision of the High Court at Nagpur in A. I. R. (32) 1945 Nag. 249.<sup>1</sup> The learned Judges who decided that case held that:

"Clause 15A of the Order overrides cl. 14 thereof. The possession of undisposed cloth by the dealers after 31-12-1944 was permitted under Cl. 15A of the Order. Clause 14 is incomplete and unworkable in so far as no provision has been made for the disposal of cloth lying unsold with the dealers after 31-12-1944. Dealers therefore had lawful excuse for possession of the cloth after 31-12-1944, and hence they had not contravened cl. 14 of the Order and were not punishable under R. 81 (4), Defence of India Rules."

This view has been adopted by a Division Bench of the Chief Court at Oudh in 1946 A. W. R. C. C. 97.<sup>2</sup> Learned counsel have also referred us to two decisions of a learned Single Judge of this Court in Cri. Revn. No. 513 of 1946,<sup>3</sup> and Cri. Revn. No. 602 of 1946,<sup>4</sup> though from a perusal of the judgments in those two cases we find that the decision turned principally upon the trial



having been vitiated by the fact that it had been held summarily without any application in that behalf having been made by the prosecution as contemplated by R. 130, Defence of India Rules. We find further that the learned Judge had before him in those cases a fact of material importance which is not to be found in the cases before us and that is that a communication had been sent to the Textile Commissioner by the Kapra Committee of which the accused were members asking for instructions about the disposal of the cloth which could not be possessed after 31-12-1944, and no reply had been received from the Textile Commissioner. On the other hand we have a decision of another learned Judge of this Court in Cri. Ref. Nos. 1229 to 1252 of 1945<sup>5</sup> in which a contrary view has been taken and the Crown relies on that decision.

[3] Thus the only question we have to consider in the cases now before us is whether the view taken by the Nagpur High Court is based upon a correct interpretation of cls. 14 and 15A, Cotton Cloth and Yarn (Control) Order, 1943. At the material period with which we are concerned in these cases, namely, the period between 1st and 10th January 1945, the relevant portion of cl. 14 of the Order stood as follows :

"14. (1) No dealer shall after 31-12-1944 buy or sell or have in his possession :

(a) any cloth or yarn manufactured in India before 1-8-1943.

(b) any cloth or yarn manufactured in India and packed after 31-7-1943 and before 1-1-1944.

(c) No manufacturer or dealer shall buy or sell or have in his possession any cloth or yarn, whether manufactured in India or elsewhere, other than that referred to in sub-cl. (1), after the expiration of twelve months from the last day of the month marked on the cloth or yarn in accordance with the directions of the Textile Commissioner under cl. 10; and no person shall buy or sell or have in his possession any such cloth or yarn in unopened bales or cases after the expiration of six months from the said date."

[4] Clause 14 in this form was introduced by Notification No. T. B. (1) 29/44, dated 4-11-1944. In order to appreciate the scope and effect of this clause correctly we think it is necessary to consider the previous history of the legislation. The Cotton Cloth and Yarn (Control) Order was first promulgated on 17-6-1943 by Notification No. 34-Tex. (1)/43. The object of the Government in promulgating the Order obviously was to control the production and sale of cloth. The supply of cloth was limited and the demand for it was very heavy. It was, therefore, necessary for the Government to ensure a fair distribution of the commodity at a reasonable price. Clause 14 of the Order, as it stood originally, was in the following terms :

"14. (1) No cloth or yarn manufactured before 1-8-1943 shall remain in full bales after 31-8-1943, and all such cloth and yarn shall be finally disposed of by retail sale not later than 31-10-1943.

(2) No person shall after 31-10-1943 offer for sale cloth or yarn which has not been marked under sub-cl. (1) of cl. 13, provided that on application made for sufficient reasons to him in this behalf the Textile Commissioner or such other person as may be specified by him under cl. 16 may extend in any particular case the provisions specified in this sub-section."

[5] It will be noticed that cloth was divided into two categories, one being cloth manufactured before 1-8-1943, and the other being cloth manufactured after that date. With regard to the former the order provided that it shall be finally disposed of by retail sale not later than 31-10-1943. With regard to the latter it was provided that it shall be marked by the manufacturer and further that no cloth which had not been marked was to be offered for sale after 31-10-1943. Clause 13 of the Order laid down that after 31-7-1943, all cloth and yarn produced by a manufacturer shall be marked by him with the date of packing in such manner as may be specified by the Textile Commissioner under cl. 10. The manner of this marking was prescribed by Notification No. 34-Tex. (15)/43, dated 7-7-1943. With regard to marked cloth it was further provided that all such cloth shall be finally disposed of by retail sale within six months of the date of packing. The object behind these provisions manifestly was to prevent the hoarding of cloth by dealers for the purpose of making unduly large profits at the expense of the consumers. There was no provision in cl. 14 as it originally stood authorising the Textile Commissioner to allow possession and disposal of cloth beyond the dates fixed in the clause itself. This authority was, however, given to the Textile Commissioner by amendment of cl. 14 by Notification No. 34-Tex. (1)/43, dated 14-8-1943. On 24-11-1943, cl. 14 was further amended by Notification No. 34-Tex. A(1) 12/43 as follows :

"14. (1) No cloth (other than hand-loom cloth) or yarn manufactured before 1-8-1943 shall, unless expressly authorised by the Textile Commissioner :

(a) be kept by any person in unopened bales or cases after 31-8-1943;

(b) be kept undisposed of by any dealer, or by any person holding on behalf of a dealer, after 31-12-1943.

(2) No cloth or yarn marked with the date of packing under the provisions of this Order shall, unless expressly authorised by the Textile Commissioner :

(a) be kept by any person in unopened bales or cases for more than three months after that date ;

(b) be kept undisposed of by any dealer, or by any person holding on behalf of a dealer, for more than six months after that date."

[6] It will be noticed that the time limit for the final disposal of cloth manufactured before 1-8-1943 was now extended by two months. Other important amendments were also made by the same Notification. In cl. 11 the Textile Commissioner was given power to issue directions from time to time in writing to any manufacturer regarding the clauses or specifications of



cloth or yarn and the maximum or minimum quantities thereof, which he shall or shall not manufacture. Clause 12 provided that no manufacturer or dealer shall, without sufficient cause, refuse to sell cloth or yarn to any person. In cl. 18 it is laid down that no dealer or other person not being a manufacturer shall at any time hold stocks of cloth or yarn in excess of his normal requirements. The object behind all these provisions obviously was to prevent any hoarding of cloth and to ensure its speedy and fair distribution. On 30-12-1943, there was another Notification No. 34-Tex. A 15/43 which provided that the cloth manufactured before 1-8-1943, could be kept by dealers only if such cloth was stamped in accordance with the directions issued in that behalf by the Provincial Government. Clause 14, as it stood after amendment by Notification No. 34-Tex. A (1) 12/43, dated 24-11-1943, held the field until 4-11-1944, when it was further amended by Notification No. T. B. (1) 29/44 to which reference has already been made above. In the meantime on 22-1-1944, the Government made a fresh Notification No. 34-Tex. A (1) 13/43 by which they introduced a new cl. 15A in the Order. This clause 15A runs as follows :

"15A. Notwithstanding anything contained in cls. 14 (1) (b) and 14 (2) (b) cloth or yarn not disposed of within the period specified in those clauses may be kept and sold by a dealer subject to the conditions notified in this behalf by the Textile Commissioner prescribing the special markings to be made on such cloth or yarn, the agency by which the marking shall be made and the fee payable for such marking; provided, however, that no such cloth or yarn shall be kept undisposed of by any dealer or by any person holding on behalf of a dealer, for more than six months after the date of such marking."

[7] This new clause governed both categories of cloth that is, cloth manufactured before 1-8-1943, and cloth manufactured after that date. It laid down that all cloth was thereafter to be marked with the special markings prescribed by the Textile Commissioner. It did not, however, fix any time limit for the keeping and disposal of cloth. This was done by two notifications, one dated 26-2-1944, (T. C. (4) 3/44) and the other dated 29-4-1944, (T. C. (4) 5/44). By these notifications all dealers and persons holding on behalf of dealers were authorised to keep cloth until 30-6-1944. The special markings were prescribed by the Textile Commissioner by Notification No. T. C. (6) 2/44, dated 27-1-1944. This notification was complimentary to Notification No. 34 Tex. A(1) 13/43, dated 22-1-1944, by which the new cl. 15A was introduced for the first time. This notification laid down the conditions subject to which cloth not disposed of within the period specified in cls. 14 (1) (b) and 14 (2) (b) could be kept and sold by a dealer and it superseded Notification No. 34-Tex. A 15/43,

dated 30-12-1943, which provided that cloth manufactured before 1-8-1943, was to be stamped in accordance with the directions issued by the Provincial Government. So far the time limit for the keeping and disposal of all cloth whether manufactured before 1-8-1943, or thereafter was 30-6-1944. This was, however, extended by another six months by Notification No. T. C. (4) 7/44, dated 22-5-1944, which runs as follows:

"In exercise of the powers conferred on me by cls. 14 (2) and 15, Cotton Cloth and Yarn (Control) Order, 1943, I hereby authorise all dealers and persons holding on behalf of dealers to keep:

(i) Cloth or yarn packed between August, 1943 and April, 1944.

(ii) Cloth manufactured before August, 1943 and marked between January and April, 1944, in the manner prescribed by the Textile Commissioner's Notification No. T. C. (6) 2/44, dated 27-1-1944 till 31-12-1944."

[8] It will be noticed that so far there was no specific prohibition to possess cloth after 31-12-1944. This prohibition was first made by Notification No. T. B. (1) 29/44, dated 4-11-1944, by means of an amendment of S. 14. In that Notification clause 14 clearly and categorically laid down that no dealer shall, after 31-12-1944, buy or sell or have in his possession (a) any cloth or yarn manufactured in India before 1-8-1943, and (b) any cloth or yarn manufactured in India and packed after 31-7-1943, and before 1-1-1944. It would thus appear that the position of the material period with which we are concerned in these cases was that cl. 14 had been amended by Notification No. T. B. (1) 29/44 dated 4-11-1944, so as to make the mere possession of cloth after 31-12-1944, an offence. Clause 15A still stood in the form in which it was introduced by Notification No. 34/Tex. A (1) 13/43, dated 22-1-1944. In that form cl. 15A could not possibly have any application to cl. 14 as it had been amended by Notification No. T. B. (1) 29/44, dated 4-11-1944. Clause 15A referred to cls. 14 (1) (b) and 14 (2) (b), though there was no (2) (b) in cl. 14 after it had been amended on 4-11-1944. Again, cl. 14 (1) (b) referred to in cl. 15A provided that no cloth or yarn manufactured before 1-8-1943 shall, unless expressly authorised by the Textile Commissioner, be kept undisposed of by any dealer or by any person holding on behalf of a dealer after 31-12-1943, but in the meantime the time limit for keeping and disposing of cloth had been extended by several Notifications, as stated above, to 31-12-1944. After the amendment of cl. 14, on 4-11-1944, cl. 15A could have no application to it and was indeed a dead letter. Clause 15A was subsequently amended by Notification No. T. B. (1) 33/45, dated 13-1-1945, which provided that in cl. 15A for the word, figures and letters "14 (1) (b) and 14 (2) (b)" the word and figures "14 (1) and (14) (2)" should be



substituted. We are not, however, concerned with this amendment because it was subsequent to the material period in the cases before us. At that period Cl. 14 stood in its amended form after 4-11-1944, and laid down a clear and categorical prohibition that no dealer shall, after 31-12-1944, buy or sell or have in his possession (a) any cloth or yarn manufactured in India before 1-8-1943, and (b) any cloth or yarn manufactured in India and packed after 31-7-1943, and before 1-1-1944. Its provisions could not be governed or controlled by Cl. 15A prior to its amendment on 13-1-1945.

[9] It is in the light of these facts that we have to determine the question: Whether the mere possession of cloth falling within the categories referred to in Cl. 14, after its amendment on 4-11-1944, was or was not an offence? We have no doubt that the answer to the above question must be in the affirmative. Possession of cloth falling within the categories referred to in Cls. 14 (1) (a) and (b) after 31-12-1944, was a clear contravention of the prohibition laid down by the clause and was, therefore, an offence punishable under R. 81 (4), Defence of India Rules. With due respect to the learned Judges of the Nagpur High Court we are unable to agree with the contrary view taken by them. They were also concerned with possession of cloth falling within the categories referred to in Cl. 14, between the 1st and 11th January 1945, but it appears that they had taken into consideration Cl. 15A, as it was amended on 13-1-1945, as a provision which governed and controlled Cl. 14. Apart from this, we are unable to agree with the view that Cl. 15A in any form could govern the provisions of Cl. 14. In our judgment Cl. 15A can only be considered as a proviso to Cl. 14 and an accused person, who claims the benefit of that proviso, must bring his case clearly within its purview by establishing that he had fulfilled the conditions prescribed by the Textile Commissioner under which alone possession of cloth was permissible in spite of the provisions of Cl. 14. As we have already pointed out, Cl. 15A, as it stood at the material period, was in fact a dead letter and could not possibly apply to Cl. 14 after its amendment on 4-11-1944, much less govern or control its provisions. Again, we are unable to accept the view that Cl. 15A should be read as if it consisted of two parts quite independent of each other, one permitting possession beyond the time limit prescribed by Cl. 14 and the other providing for certain conditions being laid down for such possession by the Textile Commissioner. In our judgment the clause must be read as a whole and cannot be anything more than a proviso to Cl. 14. For the purpose of deciding the case before us it is

not necessary for us to consider the effect of Cl. 15A after its amendment on 13-1-1945, and its relation to Cl. 14 as it stands after its amendment on 4-11-1944. Again, we find that the learned Judges of the Nagpur High Court were of the opinion that no breach of the provisions of Cl. 14, can amount to a contravention entailing the penalty provided by R. 81 (4), Defence of India Rules until it is established that the contravention falls within the definition of that term in R. 5, Defence of India Rules which runs as follows:

"If any person to whom any provision of these Rules relates, or to whom any order made in pursuance of these Rules is addressed or relates, or who is in occupation, possession or control of any land, building, vehicle, vessel or other thing to which such provision relates, or in respect of which such order is made:—

(a) fails without lawful authority or excuse himself, or in respect of any land, building, vehicle, vessel or other thing of which he is in occupation, possession or control, to comply, or to secure compliance, with such provision or order or,

(b) evades, or attempts to evade, by any means such provision, or order:—  
he shall be deemed to have contravened such provision or order; and in these Rules the expression 'Contravention' with its grammatical variations includes any such failure, evasion or attempt to evade."

[10] Having referred to this Rule, they observed in their judgment as follows:

"The failure to comply or to secure compliance with Cl. 14 of the Order by the dealers without lawful excuse is contravention of the Order which is made punishable and not a mere breach of Cl. 14 of the Order."

[11] With due respect to the learned Judges we are unable to agree with that view. In our judgment R. 5, Defence of India Rules is intended to enlarge the scope of contravention and not to limit or curtail it. Rule 5 is intended to widen the field of contravention by including within its ambit an act which, though it may not be a *prima facie* breach of any provision, is yet an evasion of or an attempt to evade that provision. The Rule has no application to an act which is a clear and direct breach of a prohibitory provision. It is important to note that R. 5, after referring to certain acts says that the person committing those acts "shall be deemed to have contravened such provision or order." Where an act is a clear and direct breach of a prohibitory provision there is no question as to whether it has to be deemed to be a contravention of that provision.

[12] For the reasons given above we hold that the five persons, in whose favour the references have been made by the learned Sessions Judge, were rightly convicted under R. 81 (4), Defence of India Rules for contravention of the prohibitory provision in Cl. 14, Cotton Cloth and Yarn (Control) Order, 1943. With regard to sentence it may no doubt be said on the one hand that there is a defect in the Order, in-



asmuch as it does not specifically lay down any provisions for the possession and disposal of cloth after the time limit prescribed by cl. 14 and this involves hardship on the dealers who may have cloth in their possession which they were unable to dispose of within the prescribed time limit. On the other hand it may be urged, perhaps with greater reason, that when cl. 14 was amended on 4-11-1944, so that the possession of cloth beyond 31-12-1944 was made an offence, the dealers must have realised that they had to get rid of all cloth within that time limit or else to apply to the proper authorities for instructions regarding its disposal after the prescribed time limit. They had an ample notice of about two months for taking the necessary steps. It may also be pointed out that, having regard to the scarcity of cloth and the heavy demand for it, it was fair on the part of the Government to presume that there will be no cloth left in the possession of the dealers after the prescribed time limit except perhaps in rare cases, provided the dealers honestly tried to sell the cloth and not to hoard it with the object of making undue profits. The time limit for possession and disposal of cloth had been extended from time to time and it was, therefore, reasonably expected that there will be no cloth left undisposed of after the prescribed time limit. In view of all the circumstances, however, we are inclined to accept the recommendation of the learned Sessions Judge that only nominal fines should be imposed in these cases. We therefore, reduce the sentence of fine imposed in each case to the nominal amount of Rs. 5. With regard to the order of forfeiture passed in respect of the cloth which was the subject of the offence we consider it advisable to leave the matter to the authorities concerned. They may, if they so choose, return the cloth to the dealers concerned and allow them to possess and sell that cloth under certain prescribed conditions.

G.B.

*Sentence reduced.*

**A. I. R. (34) 1947 Allahabad 399 [C. N. 150.]**  
SAPRU J.

*Mt. Mahadei — Plaintiff — Appellant v. Sahu Lachmi Narain and others — Defendants — Respondents.*

Second Appeal No. 310 of 1946, Decided on 5-5-1947, from decision of Small Cause Court Judge and exercising powers of a Civil Judge, Allahabad, D/- 20-2-1945.

(a) Trusts Act (1882), S. 82—Property purchased in name of wife if belongs to husband — Presumption.

A married woman is capable of holding and acquiring property, and there is no presumption that property purchased in the name of a married woman belongs to her husband: 19 A. I. R. 1932 Lah. 193, *Rel. on.*

[Para 4]

(b) Civil P. C. (1908), O. 21, R. 63—Burden of proof—Suit by defeated claimant—Defence of benami—Initial burden on whom lies—Evidence Act (1872), Ss. 101 to 104.

No doubt the onus of proving the benami character of a transaction lies on the party who alleges it. But where an objection under O. 21, R. 58 by the wife of the judgment-debtor is dismissed in default and she brings a suit for declaration that the property attached belongs to her and not to her husband, the initial burden of proving that she is the owner of the property lies on her and not on the defendant who pleads that the property was purchased by the judgment-debtor benami in the name of his wife: 19 A. I. R. 1932 Lah. 193 and 21 A. I. R. 1934 All. 866, *Ref.* [Para 6, 7]

(44-Com.) C. P. C. O. 21 R. 63 N. 19 pt. 1.

(c) Civil P. C. (1908), S. 100—Finding of fact—Question of ownership—No interference.

A finding by the lower appellate Court on the question of ownership of certain property being a finding of fact cannot be interfered with in second appeal. [Para 8]

(44-Com.) C. P. C., Ss. 100 & 101 N. 36 pt. 7 and N. 37 pt. 18.

*Cases referred :—*

1. (32) 19 A.I.R. 1932 Lah. 193:136 I.C. 270, Hari Ram v. Kundan Lal.
2. (25) 48 Mad. 605; 12. A.I.R. 1925 P.C. 181: 52 I.A. 286 : 88 I. C. 327 (P. C.), Sura Lakshmiah Chetty v. Kothanda Rama Pillai.
3. (34) 21 A. I. R. 1934 All. 866: 150 I. C. 1041, Hira Lal v. Mt. Jāmna.

*M. A. Kaemi—*for Appellant.

*A. K. Mukerji and Brij Mohan Das—*

for Respondents.

**Judgment.**—The plaintiff, Mst. Mahadei, is the appellant in this case. The suit out of which this appeal arises was brought by Mst. Mahadei for a declaration that she was the owner of the property in dispute and that it was not liable to attachment and sale in execution of the decree No. 170 of 1937, which the defendants-respondents had obtained against her husband Jagannath. It appears that in 1937 one Lachmi Narain obtained a decree against her husband Jagannath. In execution of that decree he wanted to sell the property, which is a residential house, in dispute. Mst. Mahadei, thereupon filed her objection under Order 21, Rule 58, to the effect that the property was hers. On the date of the hearing of this objection no appearance in Court was put in by her and the objection was dismissed in her absence. It appears that there was another objection filed by her of the same nature and this was dismissed on 12-9-1942, also for default. Thereafter she brought the suit out of which this appeal arises.

[2] The defence to this suit was that her husband Jagannath might have made fictitious and benami transactions of the property in favour of his wife Mahadei in order to defraud his creditors and that the plaintiff could not be permitted to take legal advantage of the fraud of her husband. In other words, the defence was that the transaction was benami in character



and that the plaintiff was not in fact the owner of the property in dispute but that the property was that of her husband.

[3] The trial Court decreed the plaintiff's suit and came to the conclusion that she was the owner of the property in dispute. This decree of the trial Court was set aside by the lower appellate Court which held that the plaintiff had failed to prove that she was the owner of the disputed house. It is against this judgment of the lower appellate Court that the plaintiff has appealed.

[4] Learned counsel for the appellant has argued that the lower appellate Court has acted on certain presumptions. It has been strenuously contended by him that the lower appellate Court has proceeded upon the presumption that property purchased by a wife must necessarily be presumed to be purchased from funds supplied by the husband. A married woman is capable of holding and acquiring property, and there is, as far as I know, no presumption that property purchased in the name of a married woman belongs to her husband and to this extent the contention of the learned counsel for the appellant is undoubtedly correct.

[5] Learned counsel for the appellant has relied upon the case in A. I. R. 1932 Lah. 193,<sup>1</sup> where it was held by Shadi Lal C. J., that there was no presumption that when a document stands in the name of a woman the property conveyed by it must be deemed to belong to the husband. It was further laid down in that case that the onus was clearly upon the person alleging the transaction to be *benami* to show that the apparent state of things is not the real state of things; in other words, that the person who appears as the owner on the face of the deed is not the real owner. Reference was made in this case to the judgment of their Lordships of the Privy Council in 48 Mad. 605,<sup>2</sup> where the test laid down by their Lordships in regard to *benami* transactions was the source of the purchase money.

[6] Reliance was also placed by learned counsel for the appellant upon the case in A. I. R. 1934 ALL. 866,<sup>3</sup> where it was held by Niamat Ullah J. that the onus of proving the *benami* character of the transaction lies on the defendant who alleges it. It is, in other words, for the party alleging that the property is *benami* to prove it be so.

[7] A careful reading of the judgment of the learned Judge, however, discloses that he has not departed from the principles laid down in the cases to which reference has been made above. Inasmuch as the plaintiff was seeking to go behind the judgment of the execution Court under O. 21, R. 58, against her, it was for her initially

to prove that it was she, and not her husband Jagannath, who was the owner of the property which was being sought to be attached. This burden she did not discharge for the reasons which have been stated with clarity by the lower appellate Court. She did not agree to go into the witness-box, nor did she produce her father who was admittedly alive and who was, or ought to have been in a position to disclose the source of the money from which the house was purchased. The executant of the sale deed by whom the house was transferred to her in 1915 was not produced. It is true that the plaintiff produced, as one of her witnesses, the scribe of the document who was about eighty-nine years old, but the learned Judge points out that the scribe was unable to say anything about the consideration of the sale deed. It is true that there is no rule of law which lays down that the husband must be deemed to be the owner of property standing in the name of his wife. It may further be that it is not uncommon in this country to purchase property in the name of a wife or other female relations, but it is unnecessary to go into all those questions in this case as the learned Judge has definitely come to the conclusion that the plaintiff's evidence that the property belonged to her is not reliable. It may be pointed out that one of the reasons which influenced the lower appellate Court's judgment was the fact that her own evidence disclosed that her husband Jagannath had got the sale deed executed in her name. In these circumstances, it cannot be said that the lower appellate Court has proceeded upon any wrong presumptions of law in this case.

[8] The definite finding of the learned Civil Judge is that the plaintiff is not the owner of the disputed house. Behind that finding it is not competent for this Court to go. The appeal, is therefore, concluded by a finding of fact which I am bound to respect. The result is that I dismiss the plaintiff's appeal with costs. Leave to file a Letters Patent appeal is refused.

K.S.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 400 [C. N. 151.]**  
SINHA J.

*Dal Chand and others—Plaintiffs—Appellants v. Parshadi Lal—Defendant—Respondent.*

Second Appeal No. 1589 of 1945, Decided on 20-2-1947, from decision of Addl. Civil Judge, Bulandshahr, D/-14-5-1945.

(a) U. P. Debt Redemption Act (13 [XIII] of 1940), S. 17—Protected land—Alienation—Prohibition as to.

The language of S. 17 is unmistakable and emphatic in its prohibition of the alienation of the protected land except in the manner provided by the Act itself.

[Para 4]



(b) U.P. Debt Redemption Act (13 [XIII] of 1940), S. 17—Plea as to inalienability of land not raised in suit—Plea if can be raised in execution—Evidence Act (1872), S. 115; C. P. C. (1908), O. 21, R. 90.

A plea that the land is inalienable under S. 17 is available to the judgment-debtor even in proceedings in execution even though no such plea was raised in the suit itself. This is only an amplification of the principle that there can be no estoppel against a statute: 8 A. I. R. 1921 All. 118 (F. B.); 6 A. I. R. 1919 All. 10 and 11 A. I. R. 1924 All. 261, *Rel. on.*

[Para 4]

('44-Com.) C. P. C., O. 21 R. 90 N. 41 pt. 12.

(c) Civil P. C. (1908), O. 21, R. 92 (3)—Confirmation of sale alleged to have been obtained by fraud—Suit to set aside sale is not barred by O. 21, R. 92: 12 A. I. R. 1925 All. 146, *Rel. on.*

[Para 6]

('44-Com.) C. P. C., O. 21 R. 92 N. 5.

(d) Civil P. C. (1908), O. 21, R. 92—Express order confirming sale is necessary in all cases—Order postponing confirmation till order of Court does not come within O. 21, R. 92.

[Para 8]

('44-Com.) C. P. C., O. 21 R. 92 N. 2 pts. 6, 7.

(e) Civil P. C., (1908) O. 21, R. 92—Order confirming sale—Notice to judgment-debtor if necessary.

The provisions of O. 21, R. 92 must be strictly followed because it is a drastic provision of law and has, in certain cases led to the extinction of rights. Notice to the judgment-debtor must be issued when the Court passes the order confirming the sale: 17 A. I. R. 1930 All. 843, *Rel. on.*

[Para 9]

('44-Com.) C. P. C., O. 21 R. 92 N. 4.

(f) Civil P. C. (1908), O. 21, R. 92 (3)—Sale attacked as without jurisdiction—Suit to set aside confirmation maintainable.

Where a sale and its confirmation is attacked as without jurisdiction a suit to set aside the sale will not be barred by O. 21, R. 92 (3) as the objection does not relate to O. 21, Rr. 89, 90 or 91.

[Para 15]

Where by reason of the amendment of a decree under the U. P. Agriculturists' Relief Act and the U. P. Debt Redemption Act a new decree, entirely different from the original, has come into existence, a sale held in pursuance of the original decree and confirmation thereof is invalid and without jurisdiction and a suit to set aside the sale and its confirmation is not barred by O. 21, R. 92.

[Paras 10, 14, 15]

('44-Com.) C. P. C., O. 21 R. 92 N. 5 pt. 6.

Cases referred:—

1. ('21) 19 A. L. J. 473 : 8 A. I. R. 1921 All. 118 : 43 All. 547 : 63 I. C. 264 (F. B.), *Katwari v. Sita Ram.*

2. ('20) 18 A. L. J. 59 : 6 A. I. R. 1919 All. 10 : 42 All. 142 : 58 I. C. 551, *Hanuman Prasad Narain Singh v. Harakh Narain.*

3. ('23) 1923-21 A. L. J. 917 : 11 A. I. R. 1924 All. 261 : 46 All. 153 : 79 I. C. 532, *Satdhar v. Ram Chandra.*

4. ('24) 1924-22 A. L. J. 1060 : 12 A. I. R. 1925 All. 146 : 47 All. 217 : 84 I. C. 1031, *Bhagwan Das v. Suraj Prasad.*

5. Ex. F. A. No. 88 of 1942, D/-3-5-1944, *Alauddin Khan v. Narain Das.*

6. ('81) 53 All. 152 : 17 A. I. R. 1930 All. 843 : 128 I. C. 818, *Pannalal v. Bhola Nath.*

7. ('28) 1928-26 A. L. J. 716 : 15 A. I. R. 1928 All. 363 : 50 All. 686 : 113 I. C. 725, *Bulaqi Das v. Kesri.*

8. ('28) 1928-26 A. L. J. 1160 : 15 A. I. R. 1928 All. 527 : 51 All. 346 : 112 I. C. 534, *Ram Kishun v. Lalta Singh.*

9. ('35) 1935 A. L. J. 261 : 22 A. I. R. 1935 All. 470 : 57 All. 690 : 157 I. C. 33, *Mangal Sen v. Mathura Prasad.*

10. ('26) 23 A. L. J. 946 : 13 A. I. R. 1926 All. 35 : 48 All. 94 : 89 I. C. 1018, *Agha Husain v. Qasim Ali.*

11. ('39) 1939 A. L. J. 211 : 26 A. I. R. 1939 All. 368 : I. L. R. 1939 All. 385 : 183 I. C. 415, *Rahim Bukhsh v. Kishan Lal.*

12. ('38) 1938 A. L. J. 575, *Zamin Ali v. Parshotam Chandra.*

*S. B. L. Gour*—for Appellants.

*C. B. Agarwala*—for Respondent.

**Judgment.**— This is an appeal by the plaintiffs whose suit for possession has been dismissed by the Courts below. On 23-6-1937, the defendant purchased the property, in execution of his simple money decree, for Rs. 50. The Temporary Postponement of Execution of Decrees Act (Act No. 10[X] of 1937) came into force on the 1st of January 1938, and the proceedings were accordingly held up. The judgment-debtors applied for amendment of the decree under the Agriculturists' Relief Act (Act No. 27[XXVII] of 1934) and the prayer was granted by an order of 5-3-1938. The amount fixed was reduced and certain instalments were allowed. On the 19th of April, 1941, there was, in compliance with the request of the judgment-debtors, a further amendment under the U. P. Debt Redemption Act (Act No. 13[XIII] of 1940) with the result that the sum found payable to the decree-holder, was Rs. 85. In 1943 the decree-holder applied for confirmation of the sale and had it confirmed. The judgment-debtors, thereafter moved an application for setting aside the sale before the Revenue Officer, but failed in their attempt. The present suit was instituted on 8-1-1944, in the Court of the Munsif of Khurja. The case with which they came to Court, was briefly this: The original decree had been amended and no confirmation of it was legally possible. The order granting confirmation was passed without notice. The land was protected land within the meaning of S. 17, U. P. Debt Redemption Act and the Revenue Officer had no jurisdiction to hold a sale of that property. It was also pleaded that the decree-holder was aware of the amendments and that, in withholding this information from the Revenue Officer, he committed fraud.

[2] The suit was resisted principally on the ground that the conduct of the decree-holder did not amount to fraud. It was also pleaded that the defendant did not know that the land was protected and, at all events, it was the duty of the judgment-debtors to have furnished the necessary information to the Court and the sale, as made, was not without jurisdiction. The bar of O. 21, R. 92, Civil P. C., was also plead-



ed. There was a further plea that the suit was barred by s. 47, Civil P. C.

[3] Both the Courts below have dismissed the plaintiffs' suit on the finding that there was no fraud perpetrated by the decree-holder and that O. 21, R. 92, Civil P. C. operated as a bar to the suit. They have, however, repelled the objection that the suit fell within the mischief of s. 47, Civil P. C. The plaintiffs have come to this Court in second appeal.

[4] The case came up before me on 21-1-1947. On the statement of the learned counsel for the appellants that the land was protected land, I granted him a short adjournment in order to secure definite instructions. He has filed an affidavit sworn by one Hari Raj Singh, who professes to be a *paikar* of the appellants to the effect that the land in dispute is protected land. I adopted this course as the language of s. 17, U. P. Debt Redemption Act, is unmistakable and emphatic in its prohibition of the alienation of a land of this character, except in the manner provided by the Act itself. I proceeded on the analogy of the class of cases like 19 A. L. J. 473,<sup>1</sup> 18 A. L. J. 59<sup>2</sup> and 1923 A. L. J. 917<sup>3</sup> which are authority for the proposition that where the land is inalienable, a plea that it cannot be touched in execution, is available to the judgment-debtor even in proceedings in execution, even though no plea to this effect was raised in the suit itself. This is only an amplification of the principle of law that there can be no estoppel against a statute. I have, however, decided to send down an issue to the Court below as to whether the land in dispute is protected land within the meaning of s. 17, U. P. Debt Redemption Act (Act 13 [XIII] of 1940), inasmuch as it might be possible for the decree-holder to rebut this position.

[5] But before I do so, I deem it necessary to address myself to some of the arguments which have been raised by the learned counsel for the parties; by the learned counsel for the appellants in support of the contention that the suit was not barred by Order 21, Rule 92 and that such a suit is permissible, and by the learned counsel for the respondent that the suit is so barred and that, on the findings recorded by the Court below, the second appeal is not entertainable.

[6] Coming now to the first question whether Order 21, Rule 92 constitutes a bar to the suit, it has been conceded by the learned counsel for the respondent that, if there is an allegation of fraud and if that fraud is established, the bar will cease to exist. Indeed, there have been so many cases of this Court on the point that the learned counsel has acted very properly in taking this stand. To mention just one, there is the

case in 1924 A. L. J. 1060.<sup>4</sup> What, therefore, falls to consider is whether the allegation of fraud has been substantiated.

[7] The learned counsel for the appellants, however, contends that even apart from the plea of fraud, the suit does not fall within the mischief of Order 21, Rule 92 as the nature of the property and the facts of the case do not attract the application of that provision of the law.

[8] I must, however, before dealing with Order 21, Rule 92, clear the ground by saying that this Court has, in the unreported case in Exn. First Appeal No. 88 of 1942,<sup>5</sup> a case to which I was a party, held that an express order of confirmation of sale is necessary in all cases.

[9] The language of the order of 23-6-1937, leaves no room for argument on this question. It says that the confirmation of the sale shall be postponed till an order of the Court. Mr. Shyam Behari Lal Gour, the learned counsel for the appellants, states that no notice of the order confirming the sale was received by his clients. This position, Mr. Chandra Bhan Agarwala, the learned counsel for the respondent, is not in a position to controvert. That the provisions of Order 21, Rule 92 must be strictly followed was held by this Court in 53 ALL. 152.<sup>6</sup> Indeed, it seems absolutely necessary that it should be so, because it is a very drastic provision of law and has, in certain cases, led to the extinction of rights. To the precise effect of want of notice to the judgment-debtors when the Court passed the order of confirmation it is not necessary to address myself.

[10] Order 21, Rule 92 sums up the result of the preceding rules starting from Rule 89. Rule 89 deals with an application to set aside the sale on deposit. The present is not a case of that character. Rule 90 deals with an application to set aside the sale "on the ground of a material irregularity or fraud," but the irregularity or fraud must be in the publication or the conduct of the sale. But where the sale is not attacked on the above grounds, but on the ground of lack of jurisdiction on the part of the sale officer to hold the sale at all, R. 92 shall, to my mind, have no application. This view of mine receives support from the observations of Boys J. in 1928 A. L. J. 716<sup>7</sup> at p. 720. Says the learned Judge:

"...but it is not all questions in which an auction-purchaser is involved that come within that bar but only those which come within the scope of one or other of the Rr. 89, 90 and 91."

[11] Almost to the same effect is the decision in 1928 A. L. J. 1160<sup>8</sup> at p. 1164:

"If O. 21, R. 92 sub-clause (3) were taken literally, no suit would ever lie to set aside an order confirming a sale where any application under Rr. 89, 90 or 91 has been disallowed or not made at all. I am inclined to



think that this rule cannot be understood in that wide and comprehensive sense. When the decree itself is being attacked on account of want of jurisdiction or even on account of fraud, undue influence or coercion as distinct from any irregularity or fraud in the sale I think a separate suit undoubtedly lies."

Also see 1935 A. L. J. 261.<sup>9</sup>

[12] The learned counsel for the respondent has taken his stand principally on the case in 23 A. L. J. 946.<sup>10</sup> The ratio of the case was that different considerations arise when the rights of third parties have come into existence. This case affords no parallel to the case before me.

[13] It is also contended that the case in 1928 A. L. J. 716<sup>7</sup> cannot, in view of the decision of this Court in 1939 A. L. J. 211,<sup>11</sup> be treated as good law. The facts of this case were entirely different. There some property not mortgaged was sold. There was no doubt an impropriety in the sale but there was no lack of jurisdiction.

[14] The position before me is different from what it was before the learned Judges in 1939 A. L. J. 211.<sup>11</sup> Here by reason of the amendment which was allowed to the judgment-debtors, under the U. P. Agriculturists' Relief Act, and the U. P. Debt Redemption Act, a new decree, entirely different from the original, had come into existence. It was held in 1938 A. L. J. 575<sup>12</sup> that "after the conversion of the decree into an instalment decree, the sale held in pursuance of the original decree must be set aside."

The confirmation of the original sale was, therefore, invalid and without jurisdiction.

[15] In the view which I have taken that the facts of this case do not attract the application of O. 21, R. 92, Civil P. C. inasmuch as the objection did not relate to Rr. 89, 90 or 91, there is obviously no bar to the suit. In this view of the case it is not necessary to deal with the question of fraud.

[16] I, therefore, send down the following issues: (1) Is the property in dispute "protected land" within the meaning of S. 17, U. P. Debt Redemption Act, Act No. 13 [XIII] of 1940? (2) Did the appellants have notice of the proceedings relating to the confirmation of the sale?

[17] The parties shall be allowed additional evidence. The learned Additional Civil Judge is requested to return his findings within two months from this date. On receipt of the findings the usual ten days shall be allowed for objections.

G.N.

*Order accordingly.*

**A. I. R. (34) 1947 Allahabad 403 [C. N. 152.]**

MULLA J.

*Ram Ratan Gupta—Applicant v. P. H. F. Dodd and another—Opposite Party.*

Criminal Revn. No. 424 of 1946 and Cri. Revn. No. 1503 of 1945, Decided on 7-11-1946, from order of Deputy Commissioner, Kumaun, D/- 3-9-1945.

Criminal P. C. (1898), S. 435—"Court"—Magistrate acting under House Rent Control and Eviction Order—*Persona designata*.

An order by an officer under House Rent Control and Eviction Order is an order passed in exercise of the powers delegated by the Provincial Government under S. 2 (5), Defence of India Act, as a *persona designata* and not as a 'Court' within the meaning of S. 435, Cr. P. C. and hence no revision lies against it: 34 A.I.R. 1947 All. 51, *Rel. on.* [Para 2]

('46-Com.) Cr. P. C., S. 435, N. 7, pt. 1.

*Case referred.—*

1. ('46) 1946 A. L. J. 214; 34 A. I. R. 1947 All. 51; I. L. R. 1946 All. 718 : 228 I. C. 337, *Hari Kishan Das v. Emperor.*

*P. N. Shukla*—for Applicant.

*Deputy Government Advocate*—for the Crown.

**Order.**—These are two connected applications in revision which raise the same question of law for consideration. The applications are directed, in each case, against an order passed by an Additional District Magistrate purporting to act under the House Rent Control Order. It appears that rents of some tenements were fixed by the Area Rationing Officer, but subsequently orders were passed by the Additional District Magistrate modifying those orders. The applicants being aggrieved by the orders passed by the Additional District Magistrate have come up in revision to this Court.

[2] On behalf of the Crown a preliminary objection has been raised to the effect that no revision lies to this Court against the orders in question. Having heard learned counsel for the applicants I find that this objection is sound and must prevail. The Additional District Magistrate has purported to act, in each case, under the House Rent Control and Eviction Order. It appears that under S. 2, Defence of India Act, the power to frame certain rules and orders has been conferred in the first place on the Central Government. The Central Government can, however, delegate that power to the Provincial Government and the latter again under sub-S. (5) of S. 2 of the Act, can delegate its power to any officer or authority subordinate to it. The House Rent Control and Eviction Order was passed under the powers so delegated and the Additional District Magistrate has purported to act in the exercise of the power so delegated to him. The simple question for consideration therefore, is whether the officer or authority to whom power is delegated by the Provincial



Government under sub-s. (5) of s. 2, Defence of India Act is a Court within the meaning of the Criminal Procedure Code so that this Court would be authorised to call for the record of that Court under s. 435 and to deal with it under s. 439, Criminal P. C. In my opinion the answer is obviously in the negative. The officer or authority to whom powers are delegated by the Provincial Government is really a *persona designata* and not a Court. The same view has been taken in 1946 A. L. J. 214.<sup>1</sup> I therefore dismiss these applications.

D.R. *Applications dismissed.*

**A.I.R. (34) 1947 Allahabad 404 [C. N. 153.]**  
SINHA AND SAPRU JJ.

*S. Mazahir Husain and others — Defendants — Applicants v. Anjuman Islamia — Plaintiff — Opposite Party.*

Civil Revn. No. 350 of 1945, Decided on 6-2-1947, from order of 2nd Civil Judge, Muzaffarnagar, D/- 16-3-1945.

(a) Court-fees Act (1870), S. 6-A (U. P.)—Who can appeal.

A defendant has no locus standi under S. 6-A to challenge the order calling upon the plaintiff to make good the deficiency in court-fee, (as for instance, by objecting that the amount of court-fee ordered to be paid is not sufficient.) [Para 4]

('44-Com.) Court-fees Act, S. 6-A Note (U. P. Ss. 6-A to 6c).

(b) Court-fees Act (1870), S. 12—Order demanding additional court-fee—Revision.

An order demanding additional court-fee does not amount to a 'case decided' and no revision will lie against such an order: 21 A. I. R. 1934 All. 620 (F. B.) and 23 A. I. R. 1936 All. 686 (F. B.), *Foll.*; 28 A. I. R. 1941 All. 298, *Expl.* [Para 6]

('44-Com.) Court-fees Act, S. 12 N. 13.

*Cases referred:—*

1. ('41) 1941-39 A. L. J. 376 : 28 A. I. R. 1941 All. 298 : I. L. R. 1941 All. 558 : 195 I. C. 758, *Mohri Kunwar v. Kesri Chandra.*
2. ('33) 1933 A. L. J. 311 : 20 A. I. R. 1933 All. 350 : 55 All. 274 : 148 I. C. 152, *Lakshmi Narain Rai v. Dipnarain Rai.*
3. ('34) 1934 A. L. J. 381 : 21 A. I. R. 1934 All. 620 : 57 All. 17 : 149 I. C. 1183 (F. B.), *Gupta & Co. v. Kirpa Ram Brothers.*
4. ('36) 1936 A. L. J. 923 : 23 A. I. R. 1936 All. 686 : I. L. R. 1937 All. 17 : 165 I. C. 1 (F. B.), *Suraj Pali v. Arya Prithinidhi Subha, U. P.*

*Mushtaq Ahmad — for Applicants.*

*M. A. Kazmi — for Opposite Party.*

**Sapru J.** — The defendants are the applicants in this revision. The suit out of which this revision arises was brought by the plaintiff Anjuman Islamia, Muzaffarnagar which is a registered body under Act 21 [XXI] of 1860 for possession of the Islamia School, Muzaffarnagar and various other reliefs. The plaintiff's allegation was that it represented a properly constituted body to manage the institution, that the defendants had, indeed, been managing

the institution under its direction and that they had been removed from the management of it at a properly constituted meeting. The plaintiffs further stated that they were still persisting to continue to manage the institution and had wanted to be placed in charge of the school building, papers and register relating to the institution. The suit was valued for purposes of jurisdiction of the Court at Rs. 6000 and for purposes of payment of court-fee at Rs. 400. Objection appears to have been taken by the defendants to the court-fee paid by the plaintiffs in the suit on the ground of undervaluation of a portion of the property in suit.

[2] The learned Civil Judge, while upholding the objection of the defendants as regards valuation, has rejected it with regard to the amount of court-fee paid. The defendants-applicants seek to have this order revised by this Court.

[3] The law prior to certain amendments with which we shall deal presently allowed a party to challenge the validity of the order directing payment of court-fee when the whole case came up in appeal but as the amount of court-fee payable by the suitor was greatly enhanced, the Legislature stepped in with a special provision and allowed the party who was called upon to make good the deficiency, a special right to challenge the propriety of the order as soon as it was passed. But this was, however, a provision specially made for the party who was called upon to pay the court-fee, but his rival cannot avail himself of this provision. This, in our opinion, is clear from S. 6A, Court-fees Act which is as follows:

"Any person called upon to make good a deficiency in court-fee may appeal against such order as if it were an order appealable under S. 104, Civil P. C.

The party appealing shall file with the memorandum of appeal, a certified copy of the plaint together with that of the order appealed against."

The order directing payment of court-fee does not find a place in S. 104, Civil P. C.

[4] It is obvious that the present applicant is not the person "called upon to make good a deficiency in court-fee." The defendants have no locus standi to challenge the order. It has been urged before us that if the applicants cannot avail themselves of S. 6A, Court-fees Act, the further question is whether a revision lies at all.

[5] The learned counsel for the applicant relied upon 39 A. L. J. 376<sup>1</sup> in support of his contention that the order, apart from the provisions of S. 6A, Court-fees Act, amounts to a "case decided" and is, therefore, open to revision. That was a case where the party who had been called upon to make good the deficiency had preferred an appeal. He had a



right to do it. The learned Judges thought if he had a right of appeal, he had a right of revision too. If, however, they intended to hold that the order amounted, otherwise, to a "case decided," we do not see our way to agree with them.

[6] An order demanding further court-fee was at one time treated as a "case decided": 1933 A. L. J. 311<sup>2</sup> but the later Full Benches dissented from that view: 1934 A. L. J. 381,<sup>3</sup> 1936 A. L. J. 923.<sup>4</sup> The result is that we dismiss the application with costs.

[7] The record of the case shall go back to the Court below so that the proceedings in the suit may be started as soon as possible.

V.B.B.

*Application dismissed.*

[C. N. 154.]

**A. I. R. (34) 1947 Allahabad 405**

VERMA AND HAMILTON JJ.

*Notified Area Committee, Deoria, through its President—Defendant—Appellant v. Sukhdeo Das and another—Plaintiffs—Respondents.*

Second Appeal No. 1306 of 1944, Decided on 8-2-1946, from decision of Addl. Civil Judge, Gorakhpur, D/- 15-9-1943.

U. P. Municipalities Act (2 [II] of 1916), Ss. 293 & 298—Encroachment on Notified Area land—Power to levy projection fees for past use and occupation.

Section 293 gives a Notified Area Committee the power to charge fees for use and occupation of land vested in the committee or entrusted to its management. It is immaterial whether such use and occupation is with or without the permission of the Committee or whether the use and occupation has taken place prior to or after the framing of by-laws under S. 298:

*Held*, on consideration of the by-laws framed under S. 298 (2), by the Notified Area Committee of Deoria that by-law No. 9 was a by-law framed under head J sub-head (d) of List I under S. 298 under which the committee could frame by-laws fixing fees in respect of future as well as existing projections and that therefore the committee was justified in demanding fees in respect of already existing projections. [Para 2]

Z. H. Lari — for Appellant.

N. D. Pant and C. S. Saran — for Respondents.

**Hamilton J.** — This is a second appeal by the Notified Area Committee of Deoria, defendant in a suit which was brought by Sukh Deo Das and another, joint owners of certain houses within the Notified Area of Deoria. What gave rise to this suit was that certain by-laws were passed by the Notified Area Committee and on the strength of those by-laws a demand was made on the plaintiffs for a certain sum as projection fees for the period from September 1937 to March 1941. Projection fees meant fees payable for encroachments made by the plaintiffs on land and drains which vested in the Notified Area Committee. It was alleged in the plaint that these projections had been erected before

23-8-1937, the date on which the by-laws came into force, and it was further stated that these projections had been made with the permission of the Notified Area Committee and so no fees could be levied. There were also allegations that the by-laws were ultra vires and that they could not have retrospective effect. The first Court found that these projections over land and drains which vested in the Notified Area had been made without permission at dates earlier than the date on which the by-laws came into force but that from the date that the by-laws came into force fees could be realised for already existing projections as well as for projections which might be made after the by-laws came into force. The lower appellate Court agreed with all the findings of the trial Court except that it held that the by-laws, read together showed that there was no intention to levy fees on projections which were already in existence on 23-8-1937. We might paraphrase this by saying that the lower appellate Court found that for projections already in existence no fees had been fixed and consequently no sum could be realised. We will here refer to the relevant sections of the Municipalities Act which by a notification of the Provincial Government have been extended to Notified Areas. Section 293 empowers a Notified Area Committee to:

"charge fees fixed by bye-law or by public auction or by agreement, for the use or occupation (otherwise than under a lease) of any immovable property vested in, or entrusted to the management of the board, including any public street or place of which it allows the use or occupation whether by allowing a projection thereon or otherwise."

In our opinion the meaning of this section is plain. If certain immovable property is vested in the Committee or is entrusted to its management the Committee may charge fees the amount of which will be settled either by an entry in the by-laws or by the holding of a public auction or by agreement entered into by the Notified Area Committee and the person who has used and occupied property over which he had no right of possession by title because it either vested in the Committee or was entrusted to the management of the Committee. To make it plain that fees could be levied even when permission had been applied for use or occupation and had been granted, the words

"including any public street or place of which it allows the use or occupation whether by allowing a projection thereon or otherwise"

were inserted in the section. The fact that these words there occur did not limit the power of the Notified Area Committee to charge fees for the use or occupation of any part of any public street or place when no permission had been sought from the Committee and no permission had been granted. To exercise the powers of the



Committee under S. 293, when fees were not fixed by public auction or by agreement the Committee under S. 298 could make by-laws, and if required by the Local Government had to make by-laws, consistent with the Act for various purposes including the furtherance of municipal administration under this Act. As S. 298 is a section of the Municipalities Act which has been extended to a Notified Area, municipal administration means administration of the Notified Area and not of the Municipality. Under para. (2) of S. 298 the Committee had the power to make certain by-laws described in list I, which immediately follows the section, but it should be noticed that this was without prejudice to the generality of the power conferred by sub-s. (1). In this List I there is subdivision E which is headed 'streets' and which, among other things, deals with conditions on which permission may be given for projections over streets and drains. There is then another heading 'J. Miscellaneous' which has a sub-s. (d) which runs as follows :

"fixing any charges or fees, or any scale of charges or fees to be paid for any municipal service or undertaking or to be paid under S. 293 (1) or S. 294 of the Act, and prescribing the times at which 'such charges or fees shall be payable,' and designating the persons authorised to receive payment thereof;"

While clause E refers to S. 209 which deals with sanctions of projections over streets, clause J refers back to S. 293, which empowers a Committee to charge fees for the use and occupation of immovable property vested in the Committee. It seems clear to us that S. 293, gives the Committee power to charge fees when use or occupation of what we may conveniently term Notified Area land has taken place and it is immaterial whether such use or occupation has taken place (for ?) one day or a month or a year or any other period, provided of course the land is still vested in the Notified Area Committee. We can see nothing inequitable in this, for a person, who has made projections on land which does not belong to him but vests in the Committee, has no right to retain possession free and if he does not like the amount of fees fixed, it is always open to him to remove the projections by which time, if he does so, he will have had perhaps for a considerable period of time the free use of the Notified Area land. The learned Civil Judge who decreed the plaintiffs' suit setting aside the decision of the trial Court, did not, as far as we can see, doubt the power of the Committee to levy fees for already existing projections but held on a perusal of the by-laws that the Committee had only fixed fees for projections which might be made after the by-laws had come into force and not for already existing ones. The bye-laws framed by the Committee purported to be under head E, Sub-head (c) and head J, sub-head (d) of S. 298. We have already pointed out

the difference between head E and head J, that is to say that head E referred to future projections and head J to all projections whether already existing or not and whether allowed or not allowed by the Notified Area Committee. The learned Judge on examining the by-laws found that almost all of them certainly referred to future projections, that is to say, were under head E, and there is no doubt that this view was correct. There remained, however, bye-law 9 to be construed. That reads as follows: 'Subject to bye-law No. 10 the annual fees for projection shall be as shown in the accompanying schedule.'

[2] The reference to bye-law 10 is immaterial as it is to the effect that when there are two or more projections on the same storey covering the same ground two separate fees shall not be payable. The language of bye-law 9 is general and there is nothing in this bye-law to indicate that there was any intention to fix fees for projections made after the bye-law came into force and not before. The only reason for which the learned Civil Judge held that this bye-law only applied to future projections was that other bye-laws, such as for instance Nos. 2 to 7, could only apply to projections made after the bye-laws came into force. The learned Judge did not realise that not all the bye-laws were under head E, sub-head (c) and that there must have been at least one under head J, sub-head (d) because this was clearly stated in the heading of these bye-laws which immediately preceded No. 1 bye-law. On the general wording of bye-law No. 9 it seems clear to us that this bye-law was a byelaw under head J, sub-head (d) of S. 298, and not a byelaw under head E, sub-head (c): There was nothing illegal or ultra vires in making at one and the same time some bye-laws under head E and some under head J and numbering them serially. The fact that certain other byelaws such as Nos. 2 to 7 only related to future projections is no help for the construction of byelaw No. 9. Byelaw No. 9 must be held to refer both to previously existing and to future projections because the Notified Area Committee under S. 293, had the power to levy fees on both classes of projections.

[3] Learned counsel for the respondents has urged that a person who wants to build a projection after the byelaw has come into force may be taken to have agreed to pay the requisite fees. Doubtless a person who makes a projection before there are byelaws does not know what fees if any he will be called upon to pay even when byelaws are made, but, if a person encroaches on property that belongs to another or to others and not to himself, it is recognised that he is liable to pay for use or occupation. In certain cases the amount which he will have to pay has to be determined by the Court but in certain cases the statute



itself fixes the amount as in the case before us and we can see nothing inequitable in the Notified Area Committee making a charge for past use and occupation of its land and S. 293 makes it quite clear that the Committee can levy fees and the Act also provides for the fixing of the fees.

[4] For reasons that we have given above, we must set aside the decision of the learned Additional Civil Judge decreeing the suit. We, therefore, allow the appeal, set aside the decree of the lower appellate Court and dismiss the suit with costs.

K. S.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 407 [C. N. 155.]**

**SINHA AND HARISH CHANDRA JJ.**

*Matloob Ali Khan—Plaintiff—Applicant v. Nabi Rasool Khan—Defendant—Opposite Party.*

Civil Revn. No. 40 of 1946, Decided on 18-2-1947, against decree of Dist. Judge, Shahjahanpur, D/-1-2-1944.

(a) U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), S. 24—Section exhaustive.

Section 24 requires evidence of certain character and is exhaustive and therefore it shuts out other classes of evidence. [Paras 7 and 8]

(b) U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), Preamble—Scope.

The Act is passed for the relief of agriculturists from indebtedness. An agriculturist mortgagor is no doubt a person for whose 'relief from indebtedness' the Act was passed but the pre-emptor of his equity of redemption cannot be called a person 'indebted' and does not belong to the class entitled to any indulgence under the Act. [Para 9]

(c) U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), Ss. 12 and 24—Application under S. 12—Compliance with S. 24.

Where an application is filed under S. 12, U. P. Agriculturists' Relief Act the requirements of S. 24 of that Act should, at the very outset, be complied with and this is not dispensed with by the fact that the applicant would be entitled to the benefit of S. 9, U. P. Debt Redemption Act. The latter Act contemplates only certain benefits; it provides no machinery for a suit or an application. [Paras 10 and 11]

(d) U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), S. 24—Documentary evidence—Mortgage deed.

A mortgagor is not expected to give a list, in the mortgage deed, of the entire property owned by him. All that is expected of him is an assurance that the security conveyed by him is good security. Hence it is wrong to say that the mortgage deed itself is the documentary evidence within meaning of S. 24. [Para 13]

*Case referred :—*

1. ('44) 1944 A. L. J. 162 : 31 A. I. R. 1944 P. C. 35 : 19 Luck. 309: I. L. R. 1944 Kar. P. C. 199: 71 I. A. 56 : 213 I. C. 342 (P. C.), Raghubraj Singh v. Hari Kishan Das.

*Mushtaq Ahmad—*for Applicant.

*M. Naseem—*for Opposite Party.

**Sinha J.**— This is an application in revision against an order of the learned District Judge

of Shahjahanpur and arises out of an application for redemption, presented under S. 12, U. P. Agriculturists' Relief Act, Act No. 27 [XXVII] of 1934.

[2] The case came up as a second appeal before a learned Judge of this Court, who, however, found that no second appeal lay. He was requested to treat the appeal as an application in revision and he acceded to that request. He was of opinion that the question raised before him was one of substantial importance and has referred it to a Bench of two Judges.

[3] The facts, material to this application, are not in controversy and are briefly these: One Azizullah Khan granted a mortgage with possession on 5-6-1896, of the property in dispute, in favour of one Abdullah Khan. The mortgagor sold the equity of redemption to a lady, Mt. Afzali Begum, wife of one Suleman Khan. The applicant pre-empted the sale. He has thus stepped into the shoes of the original mortgagor. The defendant is the successor-in-interest of the original mortgagee.

[4] In the application or the plaint, filed by the plaintiff-applicant, he said that he was an agriculturist and so was the original mortgagor. This allegation was denied by the defendant.

[5] The learned Assistant Collector, on the strength of some oral evidence, found that the original mortgagor was an agriculturist and so was the applicant. He found the entire debt paid off and passed an unconditional decree for redemption. On appeal, the learned District Judge held that the evidence contemplated by S. 24, U. P. Agriculturists' Relief Act, was not led by the applicant and he had not, therefore, succeeded in establishing his claim for redemption. Section 24 required some documentary evidence in proof of the character of the mortgagor, as an agriculturist, on the date of the mortgage. In the absence of such documentary evidence

"the status of the mortgagor on that date shall be determined with reference to the entries in the record-of-rights or the annual registers prepared under the Land Revenue Act, 1901, of the year nearest to the year of mortgage for which they exist."

It is not pretended that the requirements of this provision were complied with.

[6] The learned counsel for the applicant, however, argues that S. 24, while no doubt requiring evidence of a certain character, does not shut out other classes of evidence. In the alternative, it is argued that, having regard to the fact that the allegation as regards the original mortgagor being an agriculturist on the date of the mortgage, was not specifically denied in the written statement, he should be given a fresh opportunity to establish that position.



[7] To take up the first contention, the argument really is that the U. P. Agriculturists' Relief Act is an enabling measure and to hold S. 24 as exhaustive and rule out all other evidence, is to defeat the very purpose of the Act. This argument is, in our view, opposed to all canons of interpretation. It is true that it is a 'remedial statute' and, according to their Lordships of the Judicial Committee in 1944 A. L. J. 162<sup>1</sup>:

"The words of a remedial statute must be construed so far as they reasonably admit so as to secure that the relief contemplated by the statute shall not be denied to the class intended to be relieved,"

but, before a person can claim the benefits of the class, he must prove, by incontrovertible evidence, that he belongs to "the class intended to be relieved." Oral testimony may or may not be reliable and it is, perhaps, for this reason, that the Legislature has taken care to define the evidence which must be adduced, before the claim can be entertained.

[8] The law on the question seems to be settled. We have the high authority of Craies that:

"Another general rule with regard to the effect of an enabling Act is expressed in the maxim, *Expressio unius est exclusio alterius*, 'Express enactment shuts the door to further implication'. If there be any one rule of law clearer than another, it is this, that, where the Legislature have expressly authorised one or more particular modes of dealing with property, such expression always excludes any other mode, except as specifically authorised." (Craies on Statute Law, Fourth Edition, page 231).

It is, therefore obvious that the applicant was bound to comply with the requirements of S. 24 before he was entitled to any relief.

[9] As regards the contention that the defendant did not specifically deny the character of the original mortgagor, as an agriculturist, on the date of the mortgage, it appears to us that the argument has no merits. There was a denial of the allegation in the plaint. But apart from it, the applicant does not belong to the class entitled to any indulgence. If a reference to the preamble is permissible, the Act was passed "for the relief of agriculturists from indebtedness." The mortgagor, Azizullah Khan, was no doubt an agriculturist for whose "relief from indebtedness", the Act was passed, but the applicant is a pre-emptor and a pre-emptor, certainly, cannot be called a person 'indebted'.

[10] It is next argued that the applicant would have been entitled to the benefit of S. 9, U. P. Debt Redemption Act and this Act does not insist upon the requirements of S. 24. This argument loses sight of the fact that the application was presented under S. 12, U. P. Agriculturists' Relief Act. The requirements of that Act should, at the very outset, have been complied with, before a stage could reach when the applicant

could be extended the benefits of the U. P. Debt Redemption Act.

[11] There is yet another answer to this contention. The U. P. Debt Redemption Act contemplates only certain benefits; it provides no machinery for a suit or an application. Here, the application for redemption was presented under the U. P. Agriculturists' Relief Act. The provisions of that Act had, therefore, to be strictly followed.

[12] It is also argued that the mortgage deed itself shows that the mortgagor was, on the date of the mortgage, an agriculturist. We do not see how this result follows. The mention of the property in the mortgage deed is intended only to secure the repayment of the sum advanced; there is no other purpose. Apart from this, there is nothing in the deed to indicate that the mortgage security constituted the entire assets of the mortgagor; he might have had property other than the one embraced by the mortgage.

[13] Lastly, it is argued that the documentary evidence, within the meaning of S. 24, was the mortgage deed itself. We do not think that this was the intention of the Legislature. The mortgagor is not expected to give a list, in the mortgage deed, of the entire property owned by him. All that is expected of him is an assurance that the security, conveyed by him, is good security, free from all cloud. The application, therefore, has no merits and we dismiss it with costs.

**Harish Chandra J.** — I agree.

D.S.

*Application dismissed.*

**A. I. R. (34) 1947 Allahabad 408 [C. N. 156.]**

**RAGHUBAR DAYAL AND WANCHOO JJ.**

*Dipa — Appellant v. Emperor.*

Criminal Appeal No. 246 and Cri. Revn. No. 581 of 1946, Decided on 24-2-1947, from order of Sessions Judge, Muttra, D/-5-2-1946.

Penal Code (1860), S. 325—Several persons including accused striking another with lathis—Whether accused actually caused grievous hurt not shown—No conviction under S. 325.

A person voluntarily causes grievous hurt when he intends to cause grievous hurt or knows it likely that he would cause grievous hurt and actually causes grievous hurt. It may be presumed from the conduct of several persons striking another with lathis that each of them intended to cause grievous hurt; but such a presumption alone is not sufficient to establish the offence of causing grievous hurt against an accused unless it be further shown that that accused actually caused grievous hurt: 33 A. I. R. 1946 All. 153, *Dissent*. [Para 6]

*Case referred:—*

1. ('45) 1945 A. L. J. 531; 33 A. I. R. 1946 All. 153: 223 I. C. 513, *Emperor v. Bishuwanath*.

*Deputy Government Advocate—*for the Crown.

**Raghubar Dayal J.**—Dipa and Harbal were committed for trial under S. 304, Penal Code. Harbal died during the pendency of the case in the



Sessions Court. Dipa was convicted under S. 325, Penal Code, and was sentenced to three years' rigorous imprisonment. He has appealed to this Court.

[2] At the time of the admission of the appeal it was ordered that a notice for enhancement of sentence be issued to Dipa.

[3] The prosecution case is that Harbal who was uncle of the accused appellant and Dipa appellant beat Shiama with thin sticks, kicks, slaps and fists on the evening of 1-11-1945, as they suspected Shiama of having stolen Dipa's *kurta*. The beating was a sustained one. Shiama received extensive contusions on various parts of his body. The beating also resulted in the fracture of two ribs.

[4] There is ample evidence on the record to support the prosecution case. It is not necessary to deal with it fully. Five witnesses deposed about it. There is nothing particular against them. The finding that Dipa appellant had beaten Shiama is therefore correct.

[5] The learned Sessions Judge has held that the provisions of S. 34, Penal Code, do not apply to the facts of the case. In this he is right as it cannot be held on the basis of evidence on record that both Harbal and Dipa beat Shiama in furtherance of any common intention. There is no evidence of any pre-arranged plan. The learned Sessions Judge further held that it could not be said which of the assailant was responsible for causing which of the injuries. He observed:

"Both the assailants were responsible for causing all the injuries according to the evidence. There is no escape from the finding that two men Harbal and Dipa made an assault on a sickly man and caused him grievous hurt. An intention on their part to cause such injuries must be presumed and each one of them must be held to be guilty under S. 325, as laid down in the Allahabad case cited above."

The case cited is the case reported in 1945 A. L. J. 531<sup>1</sup>

[6] We are of opinion that the learned Sessions Judge has been wrong in convicting the appellant of the offence under S. 325, Penal Code, when it could not be held that he himself had caused any of the grievous injuries on the deceased. A person voluntarily causes grievous hurt when he intends to cause grievous hurt or knows it likely that he would cause grievous hurt and actually causes grievous hurt. It may be presumed from the conduct of several persons striking another with lathis that each of them intended to cause grievous hurt; but such a presumption alone is not sufficient to establish the offence of causing grievous hurt against an accused unless it be further shown that that accused actually caused grievous hurt. This aspect of the matter seems to have been overlooked in the case cited above.

[7] The case reported in 1945 A. L. J. 531<sup>1</sup> does 1947 A/52 & 53

tend to support the reasoning of the learned Sessions Judge. The observations of Mulla J. in the case at page 536 were, however, simply to this effect:

"At the same time I think when four persons simultaneously attack another person with lathis, it can fairly be presumed against every one of them that he had at least the intention of causing grievous hurt. I think, therefore, that each one of the appellants in this case is guilty of an offence under S. 325, Penal Code."

These observations did not refer to the actual causing of grievous hurt by each individual appellant. Earlier in the judgment the learned Judge expressed the opinion that S. 34, Penal Code, could not be brought into operation in that case and that each one of the appellants could be held responsible only for the act committed by him and the result produced thereby, and that though the prosecution evidence sought to connect one of the appellants with one of the two injuries on the head which resulted in fracture that evidence was not consistent. There were two fractures of the parietal bones underneath the seats of the two injuries on the head. We are of opinion that when there was no evidence to indicate as to which of those four appellants actually caused those grievous hurts none of them could have been convicted of the offence under S. 325, Penal Code. We, therefore, disagree with the view expressed in that case.

[8] We are therefore of opinion that the conviction of Dipa appellant must be altered to one under S. 323, Penal Code, from S. 325, Penal Code. We therefore allow the appeal to this extent that we alter the conviction from S. 325, to S. 323, Penal Code, and reduce the sentence from three years to one year's rigorous imprisonment. It appears that Dipa has already served more than a year in jail. He is therefore to be released forthwith if not required to be detained under any other process of law. The notice of the enhancement of sentence is discharged.

D.S.

Order accordingly.

A. I. R. (34) 1947 Allahabad 409 [C. N. 157.]  
SINHA J.

Ahmad Hasan — Defendant—Appellant  
v. Shri Sanatan Dharma School, Ghaziabad  
—Plaintiff—Respondent.

Second Appeal No. 2299 of 1943, \*Decided on 22-11-1945, from decision of 2nd Civil Judge, Meerut, D/-5-7-1943.

Limitation Act (1908), Art. 144—Adverse possession—Latrine constructed by defendant's ancestors on plaintiff's land—Latrine in defendant's use for over 12 years—Construction not of flimsy character—Held defendant acquired title by adverse possession.

Where on a piece of land belonging to the plaintiff and used by him, there was a latrine constructed by the ancestors of the defendant and it was in defendant's use for over twelve years and there was nothing to suggest that the construction was of a flimsy character



or of a character indicative of an intention on the part of the defendant to use it temporarily and not permanently:

*Held* that defendant's possession was of such a nature as entitled him to perfect his title to the latrine by adverse possession. Hence plaintiff's prayer for demolition of the latrine could not be granted: 24 A. I. R. 1937 All. 429; 26 A. I. R. 1939 All. 161, 16 Bom. 338 and 21 A. I. R. 1934 P. C. 23, *Ref.* [Para 9]

('42-Com.) Limitation Act, Arts. 142-144 N. 11.

*Cases Referred* :—

1. ('37) 1937 A. L. J. 384 : 24 A. I. R. 1937 All. 429; 169 I. C. 962, Ramchandra v. Asa Ram.
2. ('38) 1938 A. L. J. 1227 : 26 A. I. R. 1939 All. 161; I. L. R. (1939) All. 217; 180 I. C. 111, Asa Ram v. Ramchander.
3. ('92) 16 Bom. 338, Framji Cursetji v. Gokuldas Madhoji.
4. ('34) 61 Cal 262; 21 A. I. R. 1934 P. C. 23; 61 I. A. 78; 147 I. C. 545 (P. C.), Secretary of State v. Debendra Lal Khan.

*M. A. Kazmi* — for Appellant.

*Jagnandan Lal*—for Respondent.

**Judgment.** — This is an appeal by an unsuccessful defendant against whom a suit for possession was decreed in part by the learned Additional Munsif. This decree was affirmed, with a substantial modification in favour of the plaintiff, by the learned Second Civil Judge of Meerut.

[2] The plaintiff is a school, Shri Sanatan Dharma School, Ghaziabad, and brought the present suit through one Lala Banwari Lal. The story with which it came to Court was briefly this: Plot No. 805-B, in area 14 biswas corresponding to old plots Nos. 1140/2, measuring 11 biswas and 6 biswansis, and 1141/3, measuring 3 biswas, belonged to the school and the school-boys had been playing over it and it had been used for other purposes of that school. The defendant, who had no concern with the plot, had, in August 1941, made a *kotha* and a courtyard, marked ABCD in the sketch map a wall, marked X and a latrine, marked Y, on a portion of the plot, without any right.

[3] The defence, in the main, was that the defendant's kachcha house existed on the site of the constructions in suit, marked ABCD, from the time of his ancestors. This house fell down six years before the municipal survey, which took place in 1935, but its walls stood up to a height of two to three feet and he had built the constructions in suit on the site of that house. The latrine was also an old construction, dating from the time of his forefathers. The land, the defence proceeded, was a grave or *takia* and the old *kothas* appertained to it. He denied the plaintiff's story that the school boys ever played on the site of the constructions ABCD or the latrine. He denied the plaintiff's possession of the property and claimed himself, along with his ancestors, to have been in possession continuously from time immemorial. The bar of estoppel was also pleaded.

[4] It appears that two men, Dr. Bishambhar Sahai and Dwarka Prasad, made a gift on 4-11-1925, of plots Nos. 1140/2 and 1141/8, with the exception of land eight yards wide, east to west, and ten yards long, north to south, lying towards the north, in favour of the school. It also appears that there had been a previous litigation between Bishambhar Sahai and one Kallan Shah for the removal of certain constructions, made by the latter, on plot No. 1140/2. The former's suit was decreed, on 19-4-1915. The area excluded from the gift, as also the fate of the previous litigation, will have a material bearing upon the fate of the present case.

[5] A commissioner was appointed and his report formed largely the basis of the judgments of the Courts below. The plaintiff's counsel admitted before the learned Additional Munsif that the construction marked X did not exist on the spot. The learned Additional Munsif, in a judgment which bears marks of care and industry, found that the plaintiff was the owner of the plot in dispute and the constructions ABCD and the latrine Y stood on plot No. 1140/2, which was a part of 805-B. He, however, found that the latrine was an old construction and the constructions marked ABCD existed on the site for over twelve years and had been made on the site of the old constructions. The oral evidence of the parties did not appear to him worthy of credit. He found that old graves existed on a part of the plot in dispute. In this view of the case, he decreed the plaintiff's suit, but rejected the prayer for the demolition of the constructions ABCD and the latrine. He held further that the sites of these constructions would revert to the plaintiff in case the defendant or his heirs abandoned the house or the latrine or gave up their use.

[6] To this decree the defendant submitted. The plaintiff, however, went in appeal and the learned Second Civil Judge in a judgment which reads more like special pleading and does not inspire confidence, decreed the suit for the demolition of the entire construction ABCD and also of the latrine. He held that the elements of estoppel had not been made out. The defendant has come before me in second appeal.

[7] The learned counsel for the appellant has strenuously contended that the case depended, almost entirely—if not entirely—upon oral evidence and it was not proper for the learned Second Civil Judge to have disagreed with the learned Additional Munsif. This criticism is not without force, but it is impossible for me, sitting in second appeal, to reverse the findings of fact. I, however, feel that the lower appellate Court has obviously gone astray with regard to two of the matters in controversy.



[8] The learned Second Civil Judge did not disagree with the finding of the learned Additional Munsif that the latrine was an old construction, more than twelve years old. But he held that it was a flimsy construction and disagreed with him in his conclusion. In so doing he purported to found himself on 1937 A. L. J. 384.<sup>1</sup> I might mention that this judgment was affirmed in appeal on Letters Patent in 1938 A. L. J. 1227.<sup>2</sup> I am, however, of opinion that this case differs in one very important particular from that case. The foundation of the rule of law followed in all such cases was laid in the well-known case in 16 Bom. 338.<sup>3</sup> The principle laid down by the learned Judges is summed up in these words:

"A bit of land is of no present use to its owner, and happens to be of use for various temporary purposes to an adjoining land-holder, and he accordingly so uses it."

The important words are "of no present use to its owner." The constructions there were a privy and sheds for cows, goats, fowls, etc., and a hut for a *ghariwallah*—all, however, structures of a flimsy and purely temporary character. In 1938 A. L. J. 1227<sup>2</sup> the act of the wrong-doer consisted of

"mere tethering of cattle and storing of logs and the construction of foundations of a house, but not visible on the surface on a piece of waste land."

A Bench of this Court held that such user did not amount to possession "adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor:" *Vide* 61 Cal. 262.

[9] Can it be said that the circumstances of the present case have anything in common with those cases? In the first place, the land in dispute is not land "of no use to the owner." Indeed, it is the plaintiff's definite case that the land is used by school-boys as a play ground and also for analogous purposes. There is nothing to suggest that the construction is of a flimsy character, or of a character indicative of an intention on the part of the occupier to use it only temporarily and not permanently. I am, therefore, of opinion that the claim with regard to the latrine must fail.

[10] The question of graves presents considerable difficulty and I am constrained to remark that the judgment of the learned Second Civil Judge on this question leaves a great deal to be desired. It must be borne in mind that a portion of the land, measuring ten yards towards the north, had been excluded from the gift in favour of the plaintiff. Banwari Lal, through whom the suit had been brought, admitted that "old graves lie in the south-eastern portion of plot No. 805 B", but qualified his statement by saying that "this portion does not

form part of the property gifted to the plaintiff." This was obviously wrong, inasmuch as the portion of the land excluded lay, as said above, in the north and not towards the south-east. The witness was either definitely lying or prevaricating and the learned Additional Munsif, not unnaturally, drew a conclusion adverse to the plaintiff and held that the graves were old and existed in the portion of the plot in dispute. The learned Second Civil Judge, however, set aside the finding of the learned Additional Munsif, but based himself almost entirely upon surmises. To quote him.

"By the *Dakhnama*, Ex.7, Dr. Bishambhar Sahai and Dwarka Prasad had obtained possession too over the said plot against Kallan Shah etc. So, it is very probable, that the 8 yards by 10 yards land excluded from the plaintiff's gift was that over which contained graves as mentioned in the decree and the judgment Exs. 5 and 6. The defendant does not claim to have made the constructions in suit on the land covered over by those graves, nor would he have done so and therefore the land covered over by the construction in suit is other than the one containing the graves, and the latter only was excluded from the plaintiff's gift."

[11] There was no room for any surmise. The land excluded lay towards the north. If Banwari Lal, the plaintiff's principal witness, or its counsel admitted that the graves lay in the south-east portion of plot No. 805-B, they could not lie in the excluded portion, for that would cut across the recitals in the gift, which is the foundation of the plaintiff's title. If these graves are old, the plaintiff's claim with regard to them must fail. I, however, feel that I must, in fairness to the plaintiff send down an issue to the Court below, in order to arrive at a clear finding as to whether the graves lie in the portion excluded from the gift or otherwise. It is also necessary to know their ages. I, therefore, send down the following issues: 1. "What exactly is the situation of the graves in dispute?" 2. How old are they?

[12] The learned District Judge of Meerut is requested to send the case to some civil Judge other than Mr. Suraj Prasad Dube. The finding should be returned within two months from this date. On receipt of the finding the usual ten days will be allowed for objections. Parties will be entitled to adduce fresh evidence.

N. S.

Issues sent down.

**A. I. R. (34) 1947 Allahabad 411 [C. N. 158.]**  
SINHA J.

*Azmat Ullah Khan and another—Defendants*  
— *Appellants v. M. Shiam Lal and another*  
— *Plaintiffs—Respondents.*

Second Appeal No. 1813 of 1945, Decided on 22-11-1946, from decision of Dist. Judge Bareilly, D/- 6-4-1945.

(a) Evidence Act (1872), S. 45—Whether disputed signature agrees with other signatures of a person



—Judge should not decide question on his own inspection—Services of expert should be requisitioned.

A Judge should not decide the question whether the disputed signature agrees with other signatures of a certain person merely on his own inspection without the assistance of any evidence. The proper course for him is to requisition the services of the expert especially in a case where the Judge does not find the matter free from difficulty and differs from the opinion of the lower Court which by reason of its familiarity with the language and script was more competent to deal with the matter. 12 A. I. R. 1925 Cal. 485 and 33 A. I. R. 1946 All. 67, *Rel. on.* [Para 7]

(b) Specific Relief Act (1877), S. 54—Perpetual injunction to restrain defendant from interfering with plaintiff's possession—Plaintiff must prove his title within twelve years of suit.

In a suit for perpetual injunction to restrain the defendant from interfering with the plaintiff's possession the plaintiff must prove title within twelve years of the date of suit. If he fails to do so he is out of Court even if his title was proved some time in the remote past. [Para 8]

*Cases referred:—*

1. ('24) 78 I. C. 668 : 12 A. I. R. 1925 Cal. 485, *J. C. Galstaun v. Sonatan Pal.*
2. ('45) 1945 A. L. J. 426: 33 A. I. R. 1946 All. 67: I. L. R. (1946) All. 130, *Darshan Singh v. Parbhu Singh.*

*L. Chandra*—for Appellants.

**Judgment.**—This is an appeal by the defendants against whom a suit for an injunction was dismissed by the learned Munsif but decreed by the learned District Judge of Bareilly. The property originally belonged to a man named Pransukh, who sold it, along with certain other zamindari property, to one Mt. Firdausi Begam. According to the plaintiffs Mt. Firdausi Begam reconveyed the property to Mt. Ganga Kunwari, an aunt of Pransukh, under a sale deed, dated 12-11-1895. Mt. Ganga Kunwari died in 1906 and was succeeded by Pransukh, who later sold it, along with a house, to a lady named Mt. Janki Kunwari, the grandmother of the plaintiffs. On the death of Mt. Janki Kunwari her son, Shanker Sahai, inherited this land, along with some property, and entered into possession thereof. After his death the plaintiffs entered into its possession.

[2] The above, in brief, is the story unfolded in the plaint. The defence, in the main, was that Mt. Firdausi Begam never reconveyed the property to Mt. Ganga Kunwari and that she remained in its possession till her death. In 1934 she executed a gift in favour of the father of the defendants and also a waqf deed in his favour. The defendants have been in possession since then.

[3] The learned Munsif found that the sale deed alleged have been executed by Mt. Firdausi Begam on 12-11-1895, in favour of Mt. Ganga Kunwari was a piece of forgery. The signature no doubt looked like hers, but it was, in point of fact, not hers. On the question of possession he

found that Mt. Firdausi Begam and, after her, the defendants have been in possession ever since. The learned District Judge did not address himself to the question of possession. He decreed the suit only on the finding that the deed of re-sale was not a fictitious document. The defendants have come to this Court in second appeal.

[4] The learned counsel contends that the finding of the learned District Judge that the deed of reconveyance, executed on 12-11-1895, was not a fictitious document, is not correct. He also argues that the lower appellate Court has, at all events, gone wrong in decreeing the suit, without addressing itself to the question of possession. I think the learned counsel is right in both his contentions.

[5] The learned Munsif had before him two documents executed in the year 1934, which admittedly bore the signatures of Mt. Firdausi Begam. On a comparison he came to the conclusion that the alleged signature on the deed of 1895 appeared to be that of a literate lady, whereas the admitted signatures appear to be those of an illiterate woman. The learned District Judge in the very opening portion of his judgment observed :

"The documents have since been produced and I scrutinized the signatures on the wakf-deed [and from this it is impossible to tell that the signature on the document of 1895 is in the same or in a different handwriting. The signature of 1934 is that of such an aged person with so feeble a hold of pen that it is impossible to tell whether it was a different person or the same person who signed a matter of nearly 40 years earlier."

[6] The propriety of a Court, constituting itself an expert in such circumstances, has been called in question in a number of cases. The leading case is that in 78 I. C. 668.<sup>1</sup> Said the learned Judges at page 672 :

"We may say at the outset that no expert evidence was given in this case on behalf of the defendant for the purpose of comparing this disputed signature with the admitted signatures of Sookias. The observations which the Judge has made have been made on his own view of the signatures. The practice of a Judge declaring whether a disputed signature agrees with the other signatures of a certain person without the assistance of any evidence but merely on his own inspection, has been disapproved by experienced Judges in many cases."

This case was referred with approval in 1945 A. L. J. 426,<sup>2</sup> to which I was a party.

[7] It appears to me that this was pre-eminent-ly a case in which the services of an expert should have been requisitioned. The learned Judge himself did not find the matter free from difficulty. The proper course for him was—more particularly because he differed from the learned Munsif on a matter on which he was by reason of his familiarity with the language and the script more competent to speak—to requisition the services of an expert.



[8] On the other question, too, I feel that it is impossible for me to uphold this judgment. Even if the plaintiffs' title was proved at some time in the remote past, but if they failed to prove their title within twelve years of the date of the suit they were clearly out of Court.

[9] I think it is necessary that the case should be sent back to the Court of the District Judge of Bareilly. He will address himself to both the questions, viz., whether the resale by Mt. Firdausi Begam on 12-11-1895, had been established and also whether the plaintiffs had succeeded in establishing their possession within twelve years of the suit. I, therefore, allow the appeal, set aside the decree of the lower appellate Court and send the case back to that Court with the direction to re-admit it to its original number and proceed and hear it according to law. Costs will abide the result.

G.N.

*Case remanded.***A. I. R. (34) 1947 Allahabad 413 [C. N. 159.]**

WALI ULLAH AND BIND BASNI PRASAD JJ.

*Shyama Narain Rai and others — Defendants—Applicants v. Suchit Prasad Rai and others—Plaintiffs—Opposite Party.*

Civil Revn. No. 421 of 1945, Decided on 8-5-1946, against decision of Civil Judge, Ghazipur, D/- 5-7-1945.

U. P. Tenancy Act (17 [XVII] of 1939), S. 288 — Question of tenant right.

Where the plaintiff brings a suit for declaration of his share on the allegation that the property in dispute including certain tenancy holdings belongs to him and the defendants as joint family property but the defendants claim exclusive rights to these tenancies on the basis of self-acquisition or partition, a question regarding tenant right is raised in the case and the civil Court is bound under S. 288 to frame an issue on the tenant right and refer it to the Revenue Court. The fact that part of the property in dispute is non-agricultural land or that there is a possibility of conflict between the findings by the two Courts with regard to different items of the property will not make any difference: 1943 A. L. W. 300 and 1944 R. D. 58, *Rel. on:* [Paras 4 & 5]

*Cases referred:—*

1. ('43) 1943 A. L. W. 300, Sheoprasad Tewari v. Shamboo Narain Singh.
2. ('44) 1944 R. D. 58, Ram Karan v. Jagbandan Dube. *Gopi Nath Kunzru—*for Applicants.  
*Mushtaq Ahmad, G. S. Pathak and K. N. Gupta—*for Opposite Party.

**Bind Basni Prasad J.**—This is a petition in revision against an order of the learned Civil Judge of Ghazipur holding that it was not necessary for him to refer any issue of tenancy under the provisions of S. 288, U. P. Tenancy Act, 1939 (Act 17 [XVII] of 1939). The material facts are as follows:

[2] The plaintiffs alleged that they and the defendants formed a joint Hindu family governed by the Mitakshara and that the zamindari

property, tenancy holdings, houses, decrees, securities and cash, and movables set out separately in schs. A to E of the plaint belonged to this joint Hindu family. They prayed that in respect of the zamindari property and the tenancy holdings only a declaration of the plaintiffs' one-third share be granted but actual division of the plaintiffs' share be made in the rest of the property. There were no less than 26 defendants and they filed separate written statements. A large number of pleas were raised by them and no less than 10 issues were framed by the learned Civil Judge. For the purposes of this revision, however, we are concerned only with one plea which was taken in defence. Some of the defendants denied that the tenancies given in the plaint were the joint family property. They claimed that either they were their self-acquisitions or were allotted to them at a partition which took place in the family many years ago. The learned Civil Judge did not frame a specific issue to determine whether the tenancy holdings were the joint family property or the separate property of any or all of the defendants. Issue No. 5 framed by him, however, ran as follows:

"Is the suit in respect of the tenancy not maintainable in this Court? Is claim relating to the property in list G beyond the territorial jurisdiction of this Court?"

[3] He proceeded to determine this issue first. The plea of want of territorial jurisdiction in respect of the property described in list G was abandoned by the defendants and as regards the point of jurisdiction he held that the suit was cognizable by him. In the course of the hearing of this issue it was pressed on behalf of the defendants that a reference should be made to the revenue Court under S. 288, U. P. Tenancy Act, for the determination of the question of tenancy. He held, however, that it was not necessary for him to make any such reference. Seventeen of the defendants come in revision to assail this order of the learned Civil Judge.

[4] After hearing learned counsel for the parties we have arrived at the conclusion that the learned Civil Judge erred in not referring the issue of tenancy to the revenue Court. The provisions of S. 288, U. P. Tenancy Act, 1939, are much wider than those of S. 273, Agra Tenancy Act, 1926. A glance at the provisions of the two sections will show this. Now S. 288 provides as follows:

"288 (1) If in any suit relating to agricultural land instituted in a civil Court, any question regarding tenant right arises and such question has not previously been determined by a Court of competent jurisdiction, the civil Court shall frame an issue on the plea of tenancy and submit the record to the appropriate revenue Court for the decision of that issue only."



It is obvious that the provisions of this section are imperative and no discretion is left in the civil Court when in any suit before it a "question regarding tenant right arises." The whole point in the present case is whether such a question has been raised. The plaintiffs alleged that the tenancies in dispute belonged to them and the defendants both whereas the defendants claimed exclusive rights to those tenancies on the basis of self-acquisition or partition. We are of opinion that a "question regarding tenant right" has been raised in this case. In 1948 A. L. W. 300<sup>1</sup> Mulla J. observed that for the application of S. 288, U. P. Tenancy Act, 1939, all that is necessary is that the defendant should raise a question regarding tenant right. As soon as any question regarding such right is raised the civil Court is bound under S. 288 to frame an issue on that question and to submit it for decision to the appropriate Revenue Court. In 1944 R. D. 58<sup>2</sup> Collister J. observed that the question whether a joint Hindu family or an individual member of it is the tenant of certain fixed rate tenancy plots is a question regarding tenant right within the meaning of S. 288.

[5] The learned Civil Judge has sought to distinguish these two cases on the ground that they related to agricultural land only whereas in the present case we are concerned with other property also. There is nothing in S. 288 to make it inapplicable where part of the property in dispute is agricultural land in respect of which a plea as regards tenancy is raised and part is not. It is impossible to distinguish the present case from the two rulings cited above. The learned Civil Judge has also remarked that the revenue Court will have to decide whether the family was joint or not when the tenancy was acquired and the civil Court will also have to make such an enquiry in regard to other items of property and there is a possibility of a conflict between the findings of the two Courts. It may be that there may arise such a conflict, but it is also possible that such a conflict may not arise. If, however, such a conflict does arise, then the two conflicting findings will be reconciled in appeal. Where the law is explicit the Court cannot refuse to enforce it because of any inconvenience. We are of opinion that the lower Court should have referred the issue of tenancy to the Revenue Court.

[6] For the reasons given above, we allow the revision and set aside the order of the lower Court refusing to refer the issue as to tenancy to the revenue Court. We direct that the learned Civil Judge shall frame an appropriate issue from the pleadings of the parties as to the tenancies in dispute, shall refer it under S. 288, U. P. Tenancy Act, 1939, to the Revenue Court and

then proceed with the case according to the law. The petitioners will have their costs of this Court from the opposite parties.

K.S.

*Revision allowed.*

**A. I. R. (34) 1947 Allahabad 414 [C. N. 160.]**

VERMA C. J. AND MALIK J.

*Mahabir Prasad Munna Lal — Applicant*  
*v. Income-tax Officer, Cawnpore — Opposite Party.*

Misc. Case. No. 465 of 1941, Decided on 3-4-1947, reference made by Income-tax Appellate Tribunal.

(a) Income-tax Act (1922), S. 34 — Discovery in consequence of definite information—Meaning of—Facts relating to previous year coming into possession of Income-tax Officer during enquiry for subsequent year — Income-tax Officer believing that income has escaped assessment — Notice under Section 34.

The Income-tax Officer is not justified in making investigation or enquiry before issuing notice under S. 34 with the object of re-opening a previous year's assessment. But if during the course of an enquiry for assessment of a particular year the Income-tax Officer comes into possession of some facts which relate to a previous year, he can rely on that information and issue notice under S. 34 if he honestly believes that the income has escaped assessment: 1946-14 I. T. R. 431 (All.), *Approved*; 34 A. I. R. 1947 All 153, *Dissented*. [Paras 12, 13]

(b) Income-tax Act (1922), S. 23 (3)—Income-tax Officer suspecting genuineness of credit entry—Notice under S. 23 (3) — Assessee's explanation found to be false — Inference as to entry being revenue receipt.

Where there are grounds for an Income-tax Officer to suspect the genuineness of a credit entry occurring in the personal account of a third party in the assessee's books of accounts, the Income-tax Officer can under S. 23 (3) require the assessee to prove that the entry represents a genuine credit in favour of that party. And if in such a case the assessee gives an explanation which is false or unbelievable there is nothing in law to prevent the Income-tax Officer or the Appellate Authority from presuming or inferring that the receipt evidenced by the credit entry is a revenue receipt provided that that is a reasonable inference from the assessee's failure to prove the source from which the money came. [Paras 14, 15]

*Cases referred:—*

1. ('46) 1946-14 I. T. R. 431 (All.), *In re, Badar Shoe Stores.*
2. *Reported in* ('47) 34 A. I. R. 1947 All. 153, *Kedar Nath v. Commr. of Income-tax C. P. & Berar.*  
*N. P. Asthana and G. S. Pathak—*for Applicant.  
*J. Swarup—*for Opposite Party.

**Malik J.**—This is a reference under S. 66 (1), Income-tax Act, (11 [XI] of 1922) by the Income-tax Appellate Tribunal. The questions referred to this Court for our answer are the following:

"(1) Where there are grounds for an Income-tax Officer to suspect the genuineness of a credit entry occurring in the personal account of a third party in the assessee's books of accounts, whether the Income-tax Officer can, under S. 23 (3), Income-tax Act, require the assessee to prove that the entry represents a genuine credit in favour of that party?

(2) When an assessee, being required in the circumstances mentioned in question No. (1) above to prove



that a credit entry represents a genuine credit in favour of a party, gives an explanation "which is false or unbelievable, whether there is anything in law to prevent the Income-tax Officer or the Appellate Authority from presuming or inferring that the receipt evidenced by the credit entry is a revenue receipt?"

(3) Whether in the circumstances of this case the initiation of the proceedings under S. 34, Income-tax Act, by the respondent was contrary to law and for that reason the assessment is invalid?"

We may at the outset say that the questions have not been happily worded and do not clearly bring out the points that have been urged before us.

[2] The assessee, Messrs. Mahabir Prasad Munna Lal, is a Hindu undivided family carrying on business as cloth merchants in Generalganj, Cawnpore. Mr. Reoti Raman, Income-tax Officer, completed the assessment for the year 1938-39 on 19-1-1939, on the basis of the income from the previous year 1937-38, the total of which after necessary deductions was Rs. 22,325. There was no appeal from this assessment by the assessee and there was no trouble till the next year when the assessment proceedings for the year 1939-40 were in progress. The Income-tax Officer for that year was Mr. N. K. Saxena. While examining the books of account for the year 1938-39, which was the relevant year, the Income-tax Officer noticed a credit entry in the name of Hari Kishan. This entry had been brought forward from the previous year. The Income-tax Officer issued notice under S. 23 (3) of the Act with regard to this item and wanted the assessee to prove the identity of Hari Kishan.

[3] It may be mentioned, and the fact is not disputed, that in the assessment year 1938-39, on the basis of the accounts for the year 1937-38, the assessee had included in the list of his liabilities under the head 'sundry creditors' an item of Rs. 14,000 as due to Lala Hari Kishan. He had carried this item forward to the next year 1938-39 and had made an entry in that year that a sum of Rs. 14,423-7-0 had been repaid to Hari Kishan and the account had been squared up.

[4] Learned counsel has not disputed the correctness of the procedure adopted by the Income-tax Officer in issuing notice under S. 23(3) of the Act in connection with the assessment for the year 1939-40. In compliance with the notice under S. 23 (3) the assessee produced his books from which it appeared that the sum of Rs. 14,000 consisted of three items of Rs. 2000, Rs. 5000 and Rs. 7000 which were alleged to have been deposited by one Hari Kishan in 1937-38. The munim of the assessee's firm, Debi Dayal, was examined as regards the identity of this Hari Kishan, and the Income-tax Officer came to the conclusion that his statement was unsatisfactory. Debi

Dayal was not able to give any information about this Hari Kishan except the fact that he had been his tenant for about two or two years and a half.

[5] On 29-11-1939, the Income-tax Officer completed the assessment for the year 1939-40, and on 2-12-1939, he issued notice under S. 34 of the Act requiring the assessee to make a return of his income from all sources which was assessable in the year ending 31-3-1939. The assessee made a return of Rs. 22,325, but the Income-tax Officer on 7-2-1940, came to the conclusion that the sum of Rs. 14,000 standing in the name of Hari Kishan represented suppressed profits which had been disguised as cash deposit in a bogus name and had, therefore, escaped assessment. The assessee was, therefore, held liable to pay income-tax on a total income of Rupees 36,325.

[6] The assessee appealed to the Appellate Assistant Commissioner of Income-tax who dismissed his appeal on 21-12-1940. The assessee then appealed to the Income-tax Appellate Tribunal, but was unsuccessful and his appeal was dismissed by the Tribunal on 4-4-1941. He then applied that a case be stated to this Court under S. 66 (1), Income-tax Act, for answer of certain questions formulated by him. This application was granted by the Tribunal. The questions of law which, according to the Tribunal, arose for decision were reframed and in the form in which they now are, they have been set out at the beginning of the judgment.

[7] The greater part of our time was, however, taken by the counsel for the assessee on question No. 3 which, according to him, was the main question for decision. We have already said that the question has not been happily framed. Learned counsel for the assessee has, however, urged that his objection to the initiation of the proceedings under S. 34 is based on the ground that the Income-tax Officer had no definite information, which had come into his possession, from which he could discover that any income, profit or gain had escaped assessment in the year 1938-39.

[8] So far as we have been able to understand learned counsel's argument, his first contention is that the Income-tax Officer had in his possession no such information which could lead to the conclusion that any income had escaped assessment, and secondly that no information had come into his possession but that he himself had made certain enquiries and was dissatisfied with the result; in other words, he had found that the statement made by the assessee's munim about Hari Kishan was not a satisfactory statement. We have already said above that learned counsel for the assessee raised no ob-



jection to the propriety of the notice under S. 23 (3). The result of issuing that notice was that to satisfy the Income-tax Officer about the entry relating to Hari Kishan, the assessee produced his books and his munim. The Income-tax Officer examined the books and examined the munim and made the following discovery which can be summarised thus:

(1) That before the issue of the notice under S. 34 the Income-tax Officer had established to his own satisfaction that the entry of Rs. 14,000 in the books of the assessee in the name of Hari Kishan was a false entry;

(2) that the statement of the munim of the assessee's firm that Hari Kishan was his tenant and had deposited the sum of Rs. 14,000 was false and that there was no such person of the name of Hari Kishan;

(3) that the assessee could not give any satisfactory explanation of this entry of Rs. 14,000 in his books and that this amount must have come into his hands from some source which the assessee did not desire to disclose; and

(4) that the deposit of Rs. 14,000 did not carry any interest.

[9] In 1946 I. T. R. 431,<sup>1</sup> to which one member of this Bench was a party, the words "definite information" coming into "the possession of the Income-tax Officer" by reason of which he "discovers" that some income has escaped assessment were carefully considered, and it was held that the words were used in S. 34 "to protect the subject against an assault by the Income-tax Officer based upon mere suspicion" and that it must be "something more than mere gossip or rumour," but that it need not necessarily be information of fact so long as "the information is definite and does lead to that belief". They have further explained this by saying that it means either direct evidence or circumstantial evidence. The word "discover," they have pointed out, "must necessarily always involve a measure merely of belief, and provided that that belief is the belief of an 'honest and reasonable person based upon reasonable grounds' that is quite enough."

[10] We have already set out the facts that had come to the Income-tax Officer's possession before he issued the notice under S. 34. It may be that he had informed himself in the course of the assessment proceedings for the year 1939-40, but all that information, howsoever it may have come into his possession, was available to him before he issued the notice under S. 34, and we are not prepared to say that the information that he had received was not such as could lead a reasonable person acting honestly to believe that a part of the income of the assessee had escaped assessment.

[11] Our attention has been drawn to another decision of this Court in Misc. Case No. 14 of 1945.<sup>2</sup> In that case the assessee had been assessed for the year 1940-41. When, however, the successor of the Income-tax Officer took up the assessment for the year 1941-42, several facts came into his possession. According to the statement of the case the Income-tax Officer came to know that "the assessee was entering into share transactions, including speculative transactions, through banks, brokers and his own brother in Calcutta; he knew of overdrafts from banks... and almost immediate sales with a view to making profits." These facts, according to the statement of the case, were all new facts which had not been known to his predecessor and which had come to his knowledge in the course of the assessment for the year 1941-42. He then issued notice under S. 34 and there was reassessment on a fresh basis as a result of that notice. The question referred to this Court was:

"Whether in the circumstances of the case the Income-tax Officer was entitled to reopen the assessment under S. 34 of the Act?"

A Bench of this Court came to the conclusion that there was no justification for issuing the notice under S. 34 on the ground that the discovery was "the result on a further investigation or a closer study of the facts and circumstances of the case" and that "such discovery would not, therefore, be in consequence of 'definite information' within the meaning of the section." If we may say so, with great respect, the learned Judges, who decided the case, did not keep clearly in mind the two stages. The investigation was made in connection with the assessment for the year 1941-42 and in the course of that investigation certain facts came into the possession of the Income-tax Officer which made him believe that a portion of the income had escaped assessment in 1940-41 and it was after these facts had come into his possession that he had issued the notice.

[12] We can see the objection in allowing an Income-tax Officer to make investigation or enquiry before issuing notice under S. 34 with the object of re-opening a previous year's assessment. In such a case the assessee would be quite justified in refusing to give any information. But we cannot see any justification for the view that, if during the course of an enquiry for assessment of a particular year the Income-tax Officer comes into possession of some facts which relate to a previous year, he cannot issue notice under S. 34. There seems to be no good reason for the view that the information having come into his possession in the course of his enquiry for assessment



for a subsequent year he cannot rely on that information and issue notice under S. 34 if he honestly believes that the income has escaped assessment. The facts stated in the statement of the case that the definite information that had come into the possession of the Income-tax Officer in the course of the enquiry for 1941-42 which made him believe that some income had escaped assessment was not in his possession when the assessment for the year 1940-41 was made were, we say so with great respect, not given due weight by the hon'ble Judges who decided the case in Misc. Case No. 14 of 1945<sup>2</sup> referred to above.

[13] We are in full agreement with the view expressed in 1946 I. T. R 431<sup>1</sup> already mentioned in an earlier part of the judgment, and we feel it, therefore, unnecessary to discuss the meaning of S. 34 in any great length. Our answer to the third question referred to us is, therefore, in the negative.

[14] As regards the first question, we cannot say that there were no grounds for the Income-tax Officer to suspect the genuineness of the credit entry. We have already set out the conclusions that the Income-tax Officer had arrived at after his examination of the books and after the statement of the munim examined on behalf of the assessee. If the case had come before us in appeal, we could not have come to the conclusion that the Income-tax Officer's estimate of the circumstances or of the evidence was erroneous. No arguments were addressed to us on the second part of this question, and learned counsel for the assessee admitted that the notice under S. 23 relating to assessment for the year 1940-41 was a proper notice. The Income-tax Officer could, therefore, require the assessee to prove that the entry represented a genuine credit in favour of a third party.

[15] The second question, if we may say so, is still more unsatisfactory. If an assessee gives an explanation which is false or unbelievable, there is nothing in law to prevent the Income-tax Officer or the appellate authority from inferring that the receipt evidenced by the credit entry is a revenue receipt. In each case it would be a question of fact and the answer must, in every case, depend on the finding whether the inference is a reasonable inference from the assessee's failure to prove his case. There is nothing in law to prevent an inference that a particular receipt is a revenue receipt, provided that that is a reasonable inference and the assessee fails to satisfy the Income-tax Officer or the appellate authority the source from which the money came. That is our answer to this question. We may mention that the point was not seriously pressed.

[16] We consider that the Department is entitled to its costs of this reference. We assess the fee of the counsel for the Department at Rs. 200. The fee certificate must be filed within six weeks. A copy of the judgment shall be sent to the Income-tax Appellate Tribunal under the seal of the Court and the signature of the Registrar.

N.S.D.

*Answers accordingly.*

**A. I. R. (34) 1947 Allahabad 417 [C. N. 161.]**

SINHA J.

*Bhagirath and others—Plaintiffs—Appellants v. Husaini and others — Respondents.*

Second Appeal No. 44 of 1946, Decided on 13-1-1947, from decision of Civil Judge, Budaun, D/- 18-10-1945.

U.P. Agriculturists' Relief Act (27[XXVII] of 1934) S. 33 — Suit for accounts — Mortgage with possession by zamindar of certain lands including sir and khudkasht — Subsequently zamindari share purchased at execution sale by third person in execution of money decree against zamindar — His son held entitled to bring suit for accounts under S. 33 in respect of mortgage — Agra Tenancy Act (2 [II] of 1901), S. 10.

Plaintiff's father was a zamindar of a patti and a mahal in which he held certain lands as his sir and khudkasht. He granted a mortgage with possession to one A in 1907. In 1915 in execution of a simple money decree against him the zamindari share to which appertained the sir rights of plaintiff's father was sold and purchased by a third person. Although plaintiff's father had parted with possession under the usufructuary mortgage of 1907 his name and after his death the plaintiff's name were recorded in revenue papers after the auction sale of 1915 as ex-proprietary tenants of the land. Plaintiff brought a suit for accounts under S. 33, U. P. Agriculturists' Relief Act, in respect of the mortgage of 1907. It was contended by the defendants that he plaintiff had no interest in the mortgage security and was not entitled to claim any relief :

*Held* that if the auction sale of 1915 had stood by itself, the ex-proprietary rights would no doubt have accrued in favour of the plaintiff thus entitling him to bring the suit since as an ex-proprietary tenant he had an interest in the mortgage security: 5 A. I. R. 1918 All. 226, *Rel. on.* [Para 5]

*Held further* that the fact that the mortgage was prior and not subsequent to the sale was of no consequence. The auction sale whether prior or subsequent to the mortgage dealt with the plaintiff's father's right as Zamindar. It did not have any effect on his sir rights. If on the transfer of his sir rights he did not avail himself of his right of actual cultivation that privilege was lost. But the right to redeem still resided in him and could never be lost unless suitable action was brought under O. 34, Civil P. C. Since nothing had happened to extinguish plaintiff's right to redeem he was entitled to bring the suit for accounts which was allied to a suit for redemption of the mortgage of 1907 : *Case law referred.* [Paras 5 and 8]

*Cases referred:—*

1. ('11) 33 All. 695 : 11 I. C. 17, Ikram Ullah Khan v. Moti Chand.
2. ('17) 39 All. 173 : 3 A. I. R. 1916 P. C. 59 : 44 I. A. 54 : 39 I. C. 454 (P. C.), Moti Chand v. Ikram Ullah Khan.
3. ('18) 16 A. L. J. 796 : 5 A. I. R. 1918 All. 392 : 47 I. C. 861, Mahomed Husain Khan v. Hanuman.



4. ('05) 32 Cal. 296 : 32 I. A. 23 : 8 Sar. 734 (P. C.),  
Khizarajmal v. Daim.  
5. ('24) 22 A. L. J. 463 : 11 A. I. R. 1924 All. 737 :  
34 I. C. 115, Tolai Misir v. Muneshwar Koeri.  
6. ('25) 23 A. L. J. 368 : 12 A. I. R. 1925 All. 420 : 47  
All 600 : 88 I. C. 290, Ram Prasad Singh v. Nepal  
Singh.  
7. ('18) 16 A. L. J. 747 : 5 A. I. R. 1918 All. 226 : 47  
I. C. 852, Ramzan. v. Bhukhal Rai.  
S. N. Katju — for Appellants.  
Z. H. Lari — for Respondents.

**Judgment.**—This is a plaintiffs' appeal and arises out of a suit under S. 33, Agriculturists' Relief Act. The facts, which are not disputed, are briefly these: One Kesho Ram, ancestor of the appellants, was a zamindar of patti and mahal Kesho Ram in which he held certain land as his sir and khudkasht. He granted a mortgage, with possession, to one Ajodhya Prasad on 19th March 1907. In 1915, in execution of a simple money decree against him, the zamindari share to which appertained the sir rights of Kesho Ram was sold and purchased by persons who are not party to this litigation. The plaintiffs, who are the heirs of Kesho Ram, have brought this suit for accounts under S. 33, Agriculturists' Relief Act (Act 27 [XXVII] of 1934) in respect of the mortgage of 19th March 1907.

[2] The defence, in the main, was that the plaintiffs have, in the events which have happened, no interest in the mortgage security and are not entitled to claim any relief. It might be mentioned that, although Kesho Ram parted with possession under the usufructuary mortgage of 1907, nevertheless the names of Kesho Ram and the plaintiffs are recorded in the revenue papers, after the auction sale of 1915, as exproprietary tenants of the land.

[3] It has been found by both the Courts below that the plaintiffs are agriculturists. The learned Munsif decreed the suit. The lower appellate Court, while agreeing with the learned Munsif that the plaintiffs are agriculturists refused them this relief on the ground that they lost all interest in the mortgage security, are not entitled to redeem the mortgage and are not, therefore, entitled to claim any relief under S. 33, Agriculturists' Relief Act.

[4] It must be mentioned at the outset that the mortgage and the auction sale took place at a time when the Agra Tenancy Act (Act 2 [II] of 1901) was in force and the rights of the parties fall to be determined within the meaning of that Act. According to S. 10, every proprietor, whose proprietary rights in a mahal or in any portion thereof are transferred, shall become a tenant with a right of occupancy in his sir land. According to it a usufructuary mortgage is a transfer. The special privilege of such a tenant was that he was entitled to hold the land at a

rent four annas in the rupee less than the rate generally payable by non-occupancy tenants for land of similar quality and with similar advantages in the neighbourhood. It was held so far back as the year 1911 in 33 ALL. 695<sup>1</sup> that, even if there is a stipulation in the sale deed as regards relinquishment of the rights of the vendor or the mortgagor of his interest in the sir land, the transferor does not lose his rights. The case went to the Privy Council 39 ALL. 173<sup>2</sup> and their Lordships of the Judicial Committee have, if anything, expressed their view and the policy of the Act in clearer and unmistakable terms. Say their Lordships at page 177 :

"It appears to their Lordships that it cannot be doubted that the policy of Act No. II of 1901 is to secure and preserve to a proprietor whose proprietary rights in a mahal or in any portion of it are transferred otherwise than by gift or by exchange between co-sharers in the mahal a right of occupancy in his "sir" lands, and in the land which he has cultivated continuously for twelve years at the date of the transfer, and that such right of occupancy is by the Act secured and preserved to the proprietor, who becomes by a transfer the exproprietary, whether he wished it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between him and the transferee. The Policy of the Act is not to be defeated by any ingenious devices, arrangements or agreements between a vendor and a vendee for the relinquishment by the vendor of his "sir" land or land which he has cultivated continuously for twelve years at the date of the transfer, for a reduction of purchase money on the vendor's failing or refusing to relinquish such lands, or for the vendor being liable to a suit for breach of contract on his failing or refusing to relinquish such lands."

[5] If the auction sale of 1915 had stood all by itself there can be no doubt that the exproprietary rights would have accrued in favour of the appellants and they would have been entitled to bring this suit. It was held in 16 A. L. J. 796<sup>3</sup> that an exproprietary tenant has an interest in the mortgage security. What is the effect of the usufructuary mortgage of 1907? That it was antecedent and not subsequent to the auction sale is, to my mind, of no consequence. The rights of Kesho Ram were two-fold, his right as a proprietor that is as a zamindar and his right as a sir holder. The auction sale, whether prior or subsequent to the usufructuary mortgage, dealt with his right as the zamindar. It did not have any effect upon his sir rights. On the making of the mortgage in 1907 the rights reserved by S. 10 came into being. Those were his rights as an exproprietary tenant and they carried with it a valued privilege that he was to hold the land on payment of rent, which was four annas in the rupee less than the rate payable by non-occupancy tenants for lands of similar quality. If on the transfer of the sir rights, he did not avail himself of his right of actual cultivation, that privilege he lost, but the



right which still resides in him, namely the right to redeem can never be lost to him unless suitable action is brought under O. 34, Civil P. C. There was no doubt a controversy at one time, whether a sale in contravention of O. 34 was void or voidable and O. 34, R. 14, Civil P. C., was the rock on which judicial opinion had split, but their Lordships of the Judicial Committee have definitely held that it is not void but voidable : 32 Cal. 296<sup>4</sup> at p. 316. Beyond this the law has introduced no change and it lies with the mortgagor to exercise his right of redemption, notwithstanding anything done by the mortgagee to deprive him of his right in case the formalities recognised by O. 34 are not gone through.

[6] The learned Civil Judge has relied upon 22 A. L. J. 463<sup>5</sup> and 23 A. L. J. 368.<sup>6</sup> The facts in the first case were these : One Tolai made a mortgage with possession of certain *sir* and *khudkasht* plots in favour of Muneswar. On the making of the mortgage exproprietary rights accrued in his favour but he did not claim the tenancy for about six years. He, however, dispossessed the mortgagee of a portion of the land without making any payment. In a suit for possession brought by the mortgagee, this Court held that he was entitled to possession. This case, to my mind, affords no parallel to the case before me. It goes only so far and no further than this that the mortgagee could not be disturbed in his possession, if the mortgagor did not take suitable action to enforce his rights as an exproprietary tenant within the period of time provided by the law and his suit for possession must succeed. The present is not a suit for possession by the mortgagee. Nor is it a suit for unconditional possession by the mortgagor. It is a suit for accounts and is allied to a suit for redemption. The usufructuary mortgage assured the mortgagee his possession, but it did not mean a transfer of the entire bundle of rights which the mortgagor possessed. In other words, it was not a sale. The right of redemption was never transferred to him and that right can never be lost to the mortgagor except, as I have already said, in the manner provided by O. 34, Civil P. C.

[7] Some light might be thrown by the case in 16 A. L. J. 747.<sup>7</sup> One Ramzan made a usufructuary mortgage of an occupancy holding in 1906. A suit for redemption was brought several years after the mortgage. Section 20 of the Act of 1901 prohibited, *inter alia*, the transfer of the interest of an exproprietary tenant, an occupancy tenant or a non-occupancy tenant. One of the defences to the suit was that the transfer was void and the suit for redemption did not lie. Sir Henry Richards, delivering the judgment of the Court,

made observations, which will be of assistance in the determination of this case. Said he :

"The lower appellate Court reversed the decree of the Court of first instance and dismissed the plaintiff's suit upon the ground that the mortgage was null and void. It seems to us that this decision is wholly wrong and inequitable. It might be that if the plaintiff came into Court and asked to get back his property without payment of the mortgage money at all on the ground of the illegality of the transaction that the Court would put him upon terms of paying the mortgage money. Even this view is not universally taken for one learned Judge at least has held that in such a case the owner of the occupancy tenancy could get back the property without paying the mortgage money. However in the present case the plaintiff very honestly comes in offering to pay the mortgage money. In our opinion he is clearly entitled to get possession on so doing."

In other words, the nature of the property transferred and lapse of time had not extinguished the right of the mortgagor to redeem. There is, on principle, no distinction between an occupancy tenancy and an exproprietary tenancy, as the prohibition contained in S. 20 of the Act applied equally to both.

[8] It is, therefore, obvious that, where as the mortgagee is entitled to retain possession of the property so long as he is not redeemed, nothing has happened to extinguish the mortgagors' right to redeem. I, therefore, allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs in all Courts. Leave to file a Letters Patent appeal is refused.

N.S.D.

*Appeal allowed.*

**A. I. R. (34) 1947 Allahabad 419 [C. N. 162.]**

VERMA C. J. AND MATHUR J.

*Narhari Shastri and others—Plaintiffs—Appellants v. Vasudeva Namboori and another—Defendants—Respondents.*

First Appeal No. 310 of 1941, Decided on 22-11-1946, from decision of 1st Senior Civil Judge, Garhwal, D/- 4-3-1941.

(a) Custom—Pandas, rights of—Pandas cannot claim to enter Badrinath temple with their Jajmans by virtue of immemorial usage.

There is no immemorial usage in existence by which the Pandas can go into the temple of Shri Badrinath with their Jajmans openly and as of right. [Para 9]

(b) U. P. Shri Badrinath Temple Act (16 [XVI] of 1939), S. 25 (1) (m)—Committee can make rules prohibiting entry of pandas along with their Jajmans.

Under S. 25 (1) (m) the Committee can make rules prohibiting the entry of pandas along with their Jajmans into the temple of Shri Badrinath. Hence the pandas are not entitled to get a declaration that they have a right to enter the precincts of the temple along with their jajmans as a matter of right. [Para 13]

(c) U. P. Shri Badrinath Temple Act (16 [XVI] of 1939), Ss. 3 (b) and 4 — S. 4 has no concern with S. 3 (b)—Any gift made to any person within precincts of temple would be endowment—Person receiving it cannot appropriate it.



Section 4 has got no concern with S. 3, Clause (b). The former only vests in the deity of Shri Badrinath the property that would not under the ordinary course belong to the deity. By that section the endowments which were in the name of other persons, but for the benefit of the temple, or which were connected with the temple, being for the convenience, comfort or benefit of the pilgrims, were vested in the deity. Under S. 3, Clause (b), any gift made to any person within the precincts of the temple would be an endowment and that person could not lay any claim to it. Hence the *pandas* are not entitled to a declaration that they have a right to accept within the precincts of Shri Badrinath temple whatever is put into their hands as a gift to them by their *Jajmans* at the time of worship. [Para 15]

(d) U. P. Shri Badrinath Temple Act (16 [XVI] of 1939), S. 25 (1) (m)—Committee can make order prohibiting *pandas* from receiving gifts inside precincts of temple.

Under S. 25, clause (m) if the Committee thought that order could not be properly maintained if the *Pandas* were allowed to haggle for and to receive gifts inside the temple at the very time when gifts were made to the deity, they can certainly make an order prohibiting the *Pandas* from receiving gifts inside the temple. [Para 16]

Cases referred:—

1. (1938) 1938 A. L. J. 680: 25 A. I. R. 1938 All. 523: 177 I. C. 653, *Narhari Shastri v. Basudeo Namburi*.
2. (1896) 1896 A. C. 88, *Municipal Corporation of the City of Toronto v. Virgo*.
3. (1896) 1896 A. C. 348, *Attorney General for Ontario v. Attorney General for the Dominion*.

*P. L. Banerji, R. C. Ghatak and B. M. Chamoola*—for Appellants.

*G. S. Pathak and D. P. Uniyal*—for Respondents.

**Mathur J.**—This is an appeal from a decree and judgment of the Senior Civil Judge of Pauri, district Garhwal, dated 4-3-1941. The plaintiffs-appellants, along with several others, brought a representative suit against the respondent, Pt. Basudeo Namburi, Rawal of Temple Shri Badrinath, seeking the following reliefs (as subsequently amended).

[1] That a declaration be granted that the plaintiffs were the *Pandas* of Badrinath temple and had a right to go into the precincts of the temple at all times and on all occasions without restriction, when the temple was open, with the object of having *darshan* of the deity. (2) That a declaration be granted that the plaintiffs had a right to go freely into the precincts of the temple with their *Jajmans* or clients, whenever it was open, for assisting them in the matter of *darshan* and worship. (3) That a further declaration be granted that the plaintiffs had a right to accept within the precincts of the temple whatever was put into their hands as a gift to them by their clients at the time of *darshan*, worship, etc. (4) That a perpetual injunction be issued to the defendant restraining him from interfering with the immemorial rights of the plaintiffs.

[2] The suit started in the month of April 1934, and was dismissed on a preliminary point

on 18-9-1934, by the then Senior Civil Judge who held that it was barred by the rule of *res judicata*, as on a former occasion a suit, brought by five of the Deoprayagi *Pandas*, was finally dismissed by the Commissioner of Kumaun acting as a High Court in the year 1896. The plaintiffs preferred a First Appeal No. 77 of 1935, against this decision to this Court, and a Bench of this Court, to which one of us was a party, reversed the judgment of the learned Senior Civil Judge holding that the claim was not barred by *res judicata*, and remitted the case for trial of the other issues arising in the case: *vide* 1938 A. L. J. 680.<sup>1</sup> While the case was still pending in the lower Court, the United Provinces Shri Badrinath Temple Act of 1939 (Act 16 [XVI] of 1939) was brought on the Statute book, and a Special Officer, representing the Committee of Management to be constituted under the Act, was appointed. The said Officer was impleaded as a defendant on 26-8-1940, and he filed a written statement on 26-10-1940.

[3] The plaintiffs alleged that they were a body of Brahman priests residing at Deoprayag and Badrinath, and had the exclusive right by immemorial custom to act as *Pandas* and "Tirath Purohits" and spiritual guides of the pilgrims to Badrinath, and, as such, had a right to conduct the pilgrims into the precincts of the temple and to assist them in having the *darshan* of the various deities and in making their offerings to the said deities; that the Rawal, who was in charge of the temple as Pujari and conducted the worship of God Badrinath under a scheme sanctioned by the Commissioner of Kumaun in the year 1899, wrongfully and without any just cause or excuse, in the month of August 1933, obstructed and threatened to obstruct the plaintiffs from entering the precincts of the temple in company with their *Jajmans* and illegally and unjustifiably restrained them from assisting the pilgrims in the usual way at the time of *darshan* and worship of the deities. It was further mentioned that this conduct of the defendant hindered the plaintiffs in the exercise of their right of entry into the temple and also tended to reduce the earnings of the plaintiffs from their *Jajmans* by way of *Suphal Dan* and remuneration for their services. It was by a subsequent application dated 5-6-1934, that an amendment of the plaint was sought for and obtained, and it was then that the right of taking within the precincts of the temple whatever was put into the hands of the plaintiffs as a gift by their *Jajmans* or clients was specifically claimed.

[4] The Rawal, Pandit Basudeo Namburi, in his written statement admitted that the plaintiffs, as Hindus, in their individual capacity,



had a right to enter Badrinath temple for the purpose of worship. But he averred that the plaintiffs had no right whatever to accept any gifts or offerings from the pilgrims within the Badrinath temple or its compound, at the time of *darshan* or worship of Badrinath and other deities. He also pleaded that the suit was barred by *res judicata* and by the law of limitation. The Special Officer in his written statement pleaded that under S. 2, Shri Badrinath Temple Act, all customs or usages were made void and inoperative, that any gift made to anybody within the precincts of the temple was declared to be an endowment by S. 3, cl. (b) of the said Act, and that, by Ss. 23 and 25 of the said Act, the Committee was empowered to provide facilities for the performance of worship by the pilgrims, to do such things as may be conducive to the convenience of the pilgrims, and to make bye-laws for the maintenance of order inside the temple and for regulating the entry of persons therein. It was denied that the plaintiffs had any right to accompany their Jajmans inside the temple or to receive any gifts from the pilgrims within the precincts of the temple. A number of issues were framed, but only the following are those with which the appeal is mainly concerned:

(1) Are the plaintiffs entitled to accompany their clients pilgrims into and within the Badrinath temple to assist them in the matter of *darshan*, worship and offerings to Badrinath and other deities therein?

(2) Are the plaintiffs entitled to receive presents or gifts from their clients pilgrims while within the Badrinath temple?

(3) Is the defendant entitled to regulate the entry of pilgrims and their Pandas into the temple? If so, to what extent?

[5] The learned Senior Civil Judge held, that the plaintiffs were not entitled to a declaration that they were Pandas of Badrinath temple and had the right to go into the precincts of the temple at all times and on all occasions without restriction when the temple was open with the object of obtaining *darshan* of the deity, and also that they were not entitled to a declaration that they had a right freely to go into the temple with their Jajmans or clients, whenever it was open, for assisting their clients in the matter of *darshan* and worship. The prayer for perpetual injunction was also refused. The suit was, however, decreed for a declaration that the plaintiffs had a right to accept, within the precincts of the temple, whatever was put into their hands as gifts (*dan dakshina* or *sankalap*) by the pilgrims for the benefit of the plaintiffs and not the temple, and to retain such gifts for their personal benefit. The right was, however, hedged in with this condition that it would be subject to the administrative control of the Temple Committee.

[6] As already stated, the plaintiffs have filed an appeal against the judgment of the learned Senior Civil Judge in so far as it dismissed a part of their claim. The defendants have filed cross-objections with regard to that part of the claim which has been decreed.

[7] On hearing the learned counsel for the parties, I think that this appeal has got no force, and it must be dismissed. There can be no doubt that the plaintiffs as Hindus were entitled to enter Badrinath temple for purposes of *darshan* and worship. This was admitted by the Rawal defendant in his written statement filed on 27-8-1934. They further claimed to have an absolute right to enter the temple in company with their Jajmans, which is denied by the defendants. The plaintiffs based this right on an immemorial usage. There cannot be the least doubt that the burden of proving the immemorial usage alleged by the plaintiffs lay on them. Before examining the evidence adduced by the plaintiffs, it would be necessary to consider certain undisputed facts which form the background of the case.

[8] In paragraph 5 of the plaint the plaintiffs alleged that the worship and affairs of the public temple were administered under a scheme sanctioned by the Commissioner of Kumaun in the year 1899, and this fact was admitted in the written statement. But as no such scheme of 1899 was filed by any of the parties, the learned Senior Civil Judge took the view that it was an obvious mistake for the scheme of 1892, a copy of which is on the record. In the absence of any copy of the scheme of 1899 or of any proof that it was not much the same as that of 1892, the matter does not affect the result. From the papers on the record, it is, however, clear that in the year 1892 rules for the regulation of pilgrims to the Badrinath temple were formulated which were sanctioned by the Commissioner of Kumaun Division on 4-7-1892. Those rules prohibited the Pandas from going inside the temple along with the pilgrims. In the following year, that is 1893, the Manager complained against the Pandas to the Maharaja of Tehri and the Commissioner of Kumaun Division, and the Commissioner passed an order that the Manager should not allow the Pandas to enter the temple if he thought that the complaint against the Deoprayagi Pandas was genuine and that police would help in the matter. In 1894 the Deoprayagi Pandas, or some of them, again moved the Commissioner of Kumaun Division asking permission to go inside the temple with their Jajmans *vide* Ex. D4. On 28-10-1894. Colonel Grigg passed an order in the following terms:

"We had better send a copy of this to the Manager for early report. It would appear that the Pandas' duty



consists in escorting the pilgrims to the temple precincts and no further. Their entering the temple can only be permitted when they do so as pilgrims."

[9] This was followed by a suit, No. 346 of 1895, by five of the Deoprayagi Pandas. The case went up to the Commissioner acting as the High Court of Kumaun and the suit was dismissed, it having been held that the plaintiffs had no right to enter the precincts of the temple with their Jajmans. It has got a great probative force under S. 13, Evidence Act. There are also certain papers on the record (Exs. 15 to 24) which go to show that in certain instances permission was sought by some of the Pandas and was refused. It will be obvious from all this that, for more than half a century, while the Pandas have, on the one hand, been trying to establish their right of entry into the temple along with their Jajmans, the management have, on the other hand, always denied their right and exercised their power of granting or refusing permission as they thought proper. The plaintiffs have produced more than 30 witnesses to show that, when the latter visited Shri Badrinath temple, they were accompanied by their Pandas, and some of them gave gifts to the latter (Pandas) within the precincts of the temple. Some of these witnesses are certainly very respectable and their varacity cannot be doubted. But even their evidence does not establish that there has been an immemorial usage by which the plaintiffs could go into the temple with their Jajmans, openly and as of right. Several thousands of pilgrims visit the temple every year, and, if 30 or 40 of them, during the course of 25 years or so, could state that they were accompanied by their Pandas and gave them gifts within the precincts of the temple, that would fall far short of establishing an usage. It must also be borne in mind that the Pandas do exert a certain amount of influence as spiritual guides on their Jajmans, and in these circumstances the statement of the majority of the witnesses produced have to be accepted with a certain amount of caution. Most of these witnesses only stated that no permission of the Rawal was obtained within their knowledge. This does not go very far in the face of the documentary evidence produced by the defendants. The learned Senior Civil Judge found on the evidence that was produced before him that after 1903, and up to 1920, the practice prevailing at Badrinath temple was not to allow any Panda, whoever he be, to go inside the temple with the pilgrims, but as a matter of concession and in certain circumstances the Rawal or his Manager gave such permission to the Pandas. I see no reason to differ from this finding of the lower Court. I think, even if no other evidence

to the contrary was available, that would be sufficient to hold that the usage as alleged was not immemorial. In the years 1923 and 1925 some Deoprayagi Pandas, who had gone inside the temple and accepted some gifts, had to tender apologies to the Rawal on his taking an exception to their conduct. Exhibit 23 shows that in the year 1923 the Rawal went so far as to exclude these Deoprayagi Pandas from going inside the temple even for *darshan*. I have no doubt in my mind that the plaintiffs miserably failed to prove that there was any immemorial usage in existence by which they were entitled to accompany their Jajmans as of right inside the precincts of the temple.

[10] After the passing of the U. P. Shri Badrinath Temple Act of 1939 (Act 16 [XVI] of 1939), it has to be seen whether the Committee or the Special Officer could place any restriction on the entry of the Pandas into the temple. Section 2 of the said Act lays down that it shall have effect notwithstanding anything to the contrary contained in . . . any decree, custom or usage. It will be clear from this that, even if any usage existed, it could be superseded by the provisions of this Act. It has, however, been contended on behalf of the appellants that there is no provision in the Act giving any power to the Committee or to the Special Officer prohibiting the plaintiffs from entering the temple along with their Jajmans. Section 23, clause (2) lays down:

"Subject to the provisions of this Act or of any rules made thereunder, it shall be the duty of the Committee to provide facilities for the proper performance of worship by the pilgrims."

[11] It has been argued that the duty of the Committee is confined to providing facilities for the proper performance of worship by the pilgrims, and that it is no part of their duty to prohibit the entry of the Pandas along with their Jajmans if the latter think it necessary for the proper performance of worship. Reference has been made to the statements of the witnesses, some of whom have deposed that in their opinion it was necessary for the performance of worship that the Panda should accompany them. It is in evidence that the management has made provision for the proper performance of worship and *darshan* by appointing certain persons who constantly remain in attendance to do the needful. But it is argued that if the pilgrims think that their worship would not be complete unless they are accompanied by their Panda, that should be given effect to. As already observed, the evidence is too meagre to hold that this is the common belief of all the innumerable pilgrims who visit Badrinath, and it would be possible to hold on the sentiments of a few persons that the worship of Badrinath without



being accompanied by a Panda would not be complete.

[12] Section 25, cl. (1) sub-cl. (m) of the same Act lays down:-

"The Committee may make by-laws not inconsistent with this Act or the rules made thereunder or any other law for the maintenance of order inside the Temple and regulating the entry of persons therein."

[13] It has been contended on behalf of the plaintiffs that regulating the entry of persons would not entitle the Committee to forbid the Pandas to enter the temple along with their Jajmans absolutely. Reliance is placed on the two English Rulings printed in 1896 A. C. 88<sup>2</sup> and 1896 A. C. 348.<sup>3</sup> It was held in those cases that a statutory power conferring a right to make bye-laws for regulating or governing a trade does not authorize the authority concerned to prohibit the carrying on of that trade. It may, however, be pointed out that prohibiting a trade is something very different from prohibiting the entry of a certain class of persons into a temple. The prohibition of a trade would be against public policy, while it may be not only lawful but also necessary to prohibit the entry of certain persons when, in the opinion of the authority making the rules, there was danger of any disorder or breach of the peace. I have no hesitation in holding that the Committee was authorised to make rules prohibiting the entry of the plaintiffs. But it appears that certain rules were framed on 27-3-1942 which are published in United Provinces Gazette dated 11-4-1942 which contemplate the admission of Pandas with their Jajmans. Rule 4 says that the Secretary shall regulate the admission of Pandas with their Jajmans in accordance with the regulations framed or direction given by the Committee from time to time. These rules were framed long after the suit was filed, and after the framing of these rules the plaintiffs can have no cause of complaint on that head. They are, however, not entitled to get a declaration that they have a right to enter the precincts of the temple along with their Jajmans as a matter of right. The finding of the learned Senior Civil Judge on this issue appears to be quite correct. It necessarily follows from this that the plaintiffs were not entitled to the perpetual injunction sought for and it was rightly refused.

[14] This brings us to the cross-objections which challenge that part of the decree by which the plaintiffs were given a right to accept within the precincts of the temple whatever was put into their hands as gifts. It has been remarked in the grounds of cross-objections that the findings of the learned Senior Civil Judge were self-contradictory, and this appears to be quite

justified. While refusing a declaration to the plaintiffs that they have a right to enter the temple along with their Jajman, the learned Senior Civil Judge has thought it fit to give them a declaration that they were entitled to receive within the precincts of the temple whatever was put into their hands. The following extracts from the judgment would show that the learned Senior Civil Judge has not been very consistent in dealing with this aspect of the case. At one place he has observed:

"The plaintiffs, as Deoprayagi Pandas have no civil right to receive gifts within the temple, and cannot accordingly seek for a declaratory decree in respect of a non-existent right against the defendants."

Then later on he proceeds to state:

"The position then is merely that there is no inherent right of any Panda or Brahman, even if allowed inside the temple, to receive the gifts, but, in case he is fortunate enough to receive any, I do not see how, under the existing provisions of the Shri Badrinath Temple Act, he can be prevented from accepting the gift itself when the donor wants to hand over the gift to him." In the end the learned Senior Civil Judge gave the plaintiffs a declaration as already stated.

[15] The defendants rely on the definition of the word "endowment" as given in S. 3, cl. (b) of the Act, by which gifts of property made to any one within the precincts of the temple are brought within the meaning of the word "endowment". It is argued on behalf of the defendants that any gift made to any person would be an endowment and he would not be entitled to appropriate it to his benefit. On the other hand, on behalf of the plaintiffs it is urged that S. 4 lays down what property shall vest in the deity of Shri Badrinath, and the gifts made within the precincts of the temple are not included in that category. On giving the matter my best consideration, I think that S. 4 has got no concern with S. 3, cl. (b). The former only vests in the deity of Shri Badrinath the property that would not under the ordinary course belong to the deity. By that section the endowments which were in the name of other persons, but for the benefit of the temple, or which were connected with the temple, being for the convenience, comfort or benefit of the pilgrims, were vested in the deity. In my opinion, under S. 3, cl. (b), any gift made to any person within the precincts of the temple would be an endowment and that person could not lay any claim to it.

[16] Under S. 25, cl. (m), it seems obvious that, if the Committee thought that order could not be properly maintained if the Pandas were allowed to haggle for and to receive gifts inside the temple at the very time when gifts were made to the deity, they could certainly make an order prohibiting the Pandas from receiving gifts inside the temple. It appears that bye-laws have been made under S. 25, cl. (1), sub cl. (n) for the



performance of duties provided in S. 23. One of the duties provided in S. 23 is to provide facilities for the proper performance of worship by the pilgrims. In these rules it has been provided by Rule 8 that:

"No persons other than those whose right to receive gifts has been specifically recognised by the Committee shall receive gifts in any form within the precincts of the temple. The permanent employees of the temple shall not receive or solicit for any remuneration, reward or *dakshina* in any form from pilgrims."

[17] In my view, the making of this rule was within the competence of the Committee and it is probably a re-assertion of what the management has all along been maintaining and trying to enforce. On behalf of the plaintiffs reliance has been placed on certain text books in order to show that the pilgrimage to Badrinath could not be complete unless a gift was made to the Pandas within the precincts of the temple. In the first place, there is nothing on the record to show if these books can be considered an authority on the subject or are generally so recognized. In the next place, they only recommend that it would be meritorious to give gifts to the Brahmans and Pandas in connection with the pilgrimage to Badrinath and do not make it obligatory. I think it would be a misreading of these books to hold that the gift has to be made within the precincts of the temple or in close proximity of the idol. Any gift made at Badrinath would be equally efficacious. In these circumstances, the plaintiffs could not be held entitled to get a declaration given to them by the learned Senior Civil Judge. The Civil Judge has himself realised that the Committee had such power and has given a declaration subject to the administrative control of the Temple Committee in so far as the maintenance of order and decency and the enforcement of proper behaviour within the temple were concerned. He has also laid down that the exercise of this right will further be restricted by any special or general conditions imposed by the Committee of Management under any bye-law framed by them in accordance with the provisions of Shri Badrinath Temple Act or any other special law that may hereafter be applicable to the temple. As a matter of fact, the declaration given by the learned Senior Civil Judge has been made nugatory by all these limitations put upon it. I am thus of opinion that this cross-objection must succeed and this part of the decree must be set aside. The result is that the plaintiffs' appeal should, in my opinion, fail and be dismissed with costs. The cross-objection should prevail and be allowed with costs. The plaintiffs' suit should stand dismissed with costs throughout.

**Verma C. J.**—I agree and do not consider it necessary to add anything beyond saying that

I should like to place on record my sense of appreciation of the great pains which the learned Judge of the Court below appears to have taken in this case. The fact that we have not found it possible to agree with certain parts of his judgment does not detract from the credit to which he is entitled for the care and thoroughness with which he has tried the case.

**Per Curiam.**—The appeal is dismissed with costs and the cross-objections are allowed with costs. The result is that the suit stands dismissed with costs throughout.

D.S.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 424 [C. N. 163.]**

**MALIK AND MOOTHAM JJ.**

*Makund Lal—Appellant v. Emperor.*

Cri. Appeal No. 714 of 1946, Decided on 28-5-1947, from order of Sessions Judge, Mirzapur, D/-30-11-1946.

(a) Criminal P. C. (1898), S. 367—Appreciation of evidence—Absence of motive for crime.

No doubt where there is direct evidence to prove the commission of murder the question of motive is not of much importance. But in a case where the case practically rests on the evidence of one witness the fact that there was apparently no sufficient motive for the accused to commit murder cannot be lost sight of by the Court in weighing the evidence for the prosecution.

[Para 6]

(46-Com). Criminal P. C., S. 367 Note 6 pt. 34.

(b) Criminal P. C. (1898), S. 342—Examination of accused in sessions trial—Nature of—Duty of Court.

The object of the examination of the accused under S. 342 is to afford the accused an opportunity of explaining any circumstances appearing in the evidence against him, and it is, therefore, incumbent on the Court to draw the attention of the accused to all the important points upon which evidence has been given by the prosecution and which will, in the absence of an explanation, tell against him. Although the Court must not cross-examine the accused it must in particular draw the attention of the accused to those circumstances which appear for the first time, or in a more extended form, in the evidence adduced by the prosecution at the sessions trial, as these are circumstances in respect of which the accused could not be expected to give any explanation when examined by the committing Magistrate.

[Para 22]

(46-Com). Criminal P. C., S. 342 N. 2.

*S. N. Mulla*—for Appellant.

*Government Advocate*—for the Crown.

**Malik J.**—One Dildil Pande was murdered on the evening of 18-10-1945, at a place called Patengra Nala in Bindhyachal. Nine persons were committed to the Court of Session to stand their trial under Ss. 148 and 302 read with Ss. 34 and 149 Penal Code. Eight of them were acquitted by the learned Sessions Judge of Mirzapur. The appellant, Makund Lal, was convicted and sentenced to death. Makund Lal has filed this appeal, and the learned Sessions Judge has sent the record to this Court for the confirmation of the sentence of death.



[2] Learned counsel for Makund Lal has argued that there is no motive for the murder and that there was no sufficient evidence to justify the conviction. The motive suggested on behalf of the prosecution is enmity. It is said that one and a half year before this incident a riot had taken place in Bindhyachal, and the deceased Dildil and a few others were prosecuted at the instance of Gulab Chand, Jhinguri Lal, Kali Prasad and Babu Nandan. The case was ultimately compounded, but the incident is relied upon to prove enmity. It will be noticed that the appellant was not one of the complainants, but it is said that he belongs to the party of the complainants who were among the accused in the Court below but were acquitted by the learned Sessions Judge.

[3] The other incident relied upon is a litigation four and a half years before the incident. Lal Behari, father of Mohan, another accused who was acquitted by the learned Sessions Judge, had started some criminal case against Dildil, but the case failed. The appellant was not a party to this case either. These two incidents, therefore, cannot provide any sufficient motive for the premeditated and brutal murder, which was committed on 18th October.

[4] The last ground for enmity suggested was business rivalry. There is, however, evidence that there are about five hundred Pandas in Bindhyachal and there is business rivalry between them for pilgrims who visit the place. Each Panda has his men, who are called Junnidars, who frequent the railway station and other places where pilgrims come and try to persuade them to go to their respective Pandas, and at times this leads to quarrels between the Junnidars and also between the Pandas. It does not appear from the evidence that there was any special rivalry between the appellant and the deceased.

[5] It was probably because it was realised that the above incidents would not provide sufficient motive for the murder, that Shital Singh, P. W. 9, in his cross-examination in the Court of Session mentioned two occasions when the deceased and the accused had exchanged hot words, once twenty days before the murder and again eight or ten days before the murder. These two incidents were mentioned for the first time in the Court of Session, and we cannot accept that this part of Shital's evidence is true.

[6] The learned Government Advocate, however, has urged that where there is direct evidence to prove the commission of murder, the question of motive is not of much importance. This is no doubt true, but in weighing the evi-

dence for the prosecution, in a case like the present, where the case practically rests on the evidence of one witness, we cannot lose sight of the fact that there is apparently no sufficient motive why Makund Lal should have committed the murder.

[7] Coming to the direct evidence, the prosecution has produced four persons who are said to have been eye-witnesses of the incident. They are Shital Singh, P. W. 9, Mahabir, P. W. 10, Mangru, P. W. 5 and Gugun, P. W. 8. The learned Sessions Judge was not favourably impressed by Mangru and Gugun, and therefore discarded their evidence. Mahabir went back on his previous statement, and in the Court of Session stated that he was not an eye-witness to the murder at all and that he had been made to depose against the accused. The learned Judge admitted in evidence, under S. 238, Criminal P. C., the statement made by Mahabir in the Court of the Committing Magistrate. Shital Singh was the only witness who has consistently deposed against all the accused that it was they who had killed the deceased Dildil.

[8] The case for the prosecution is that the appellant, Makund Lal, and the other accused became very friendly with Dildil eight or ten days before the incident. Mt. Mantoria, who had been living with Dildil as his wife, had tried to dissuade him from associating with these people and had warned him that some day they would take his life. She had for the protection of Dildil asked one of the Junnidars, Mahabir, to follow Dildil and to guard him against any harm. Shital, the other witness, was also a servant of Dildil, and it was his duty to go about with Dildil as a sort of body-guard.

[9] There is no apparent reason why Mt. Mantoria should have become apprehensive. She admits that she is a purdushin woman and never came out of the purdah in her husband's life time, and that Dildil never used to talk to her about his enmities or friendships with other Pandas. She was cross-examined at length about the reason for her suspicion. She also referred to the two litigations mentioned by us above which led her to think that the accused were inimically inclined towards Dildil, and from which she suspected that their apparent friendliness was merely a guise to enable them to have their revenge on him. It, therefore, appears to us that the story about Mt. Mantoria's suspicion was probably introduced with the object of explaining why Mahabir was with Dildil at the time of the murder rather than doing his usual work of trying to catch pilgrims for his master.



[10] Munai Barai is another witness who, though he was not a witness to the murder, was produced to show that the deceased was seen in the company of Makund Lal before the murder. He has deposed that at about 5-30 in the evening of the incident Makund Lal first came to his shop, and then came Dildil followed by his two servants, Shital and Mahabir. Makund Lal offered betel leaves to Dildil; and then they all left together and went towards the Patengra Nala. The witness heard of the murder one hour or three quarters of an hour after that. Learned counsel for the appellant has relied on the facts that Munai Barai was found to be in possession of three chhataks of opium and was prosecuted under the Excise Act, and that he was once found drunk and was convicted on that account, as evidence to show that Munai Barai is a bad character and should not be relied upon. He has also urged that Munai Barai has not said that the deceased was accompanied by some pilgrims from Banda, though Shital Singh says that there were five or six pilgrims with him, and that the police made no attempt to prove who those pilgrims were. Munai Barai's statement, however, does not carry us very far, and there seems to be no reason why Makund Lal, if he had made up his mind to murder Dildil should have lain in wait at Munai Barai's shop, to create evidence against himself. According to the evidence of Shital Singh, Dildil used to go every evening to attend the call of nature to Patengra Nala during the rainy season and so long as water was available in the Nala. If eight of the associates of the appellant lay in wait for Dildil near the place of occurrence, there seems to be no reason why Makund Lal should have waited at the shop of this witness. He might have overtaken Dildil on the way instead of waiting at the shop.

[11] The time when the murder was committed is of some importance in the case, but it is not possible to fix it with any exactitude. All that can be said is that the murder was committed between 5 and 6-30 in the evening. According to Shital, Dildil left the temple before 5 p. m. The temple gate is opened at 4 p. m. and there were five or six pilgrims from Banda. They were taken by Dildil to the temple and after they had performed their worship Dildil left for Patengra Nala to ease himself. The distance between the temple and the Patengra Nala is about half a mile. On the way he is said to have stopped at the shop of Munai Barai for betel leaves. From Munai Barai's shop he is said to have proceeded to the Nala. There Makund Lal and Dildil are said to have asked Shital and Mahabir to wait on one side of the

railway embankment, while they went over to the other side to ease themselves. Eight or ten minutes after Dildil had parted company from Shital and Mahabir, it is said that the latter heard a shout whereupon they rushed to the spot to find that Dildil was being pinned down by the other eight accused while Makund Lal was hacking at his face and head with a gandasa. Makund Lal is said to have been squatting on the ground and hitting Dildil with the gandasa. When Shital and Mahabir reached near the spot they shouted out to the accused to desist. Two of the accused, Gulab Chand and Kali Prasad, threatened them that if they proceeded further they would meet with the same fate. After having murdered Dildil, all the accused are said to have left towards the South. On hearing Dildil's cry Mangru and Gugun, who had also come to the Patengra Nala to ease themselves, came towards the place and saw the incident. It was mentioned in the first information report that there were two others, but no attempt has been made to find who they were.

[12] The place where the occurrence took place is within one hundred to one hundred and fifty steps from the railway police outpost. There are no trees or houses between the outpost and the place of occurrence, but the intervening land is uneven. The Railway platform is within one and a half furlongs from the place of occurrence. There is an abadi where Mushars live which is also not very far from the place of occurrence—it may be at a distance of one and one and a half furlongs. It is not explained why no cry for help was made by any of the witnesses who had seen the man being murdered in cold blood. It also does not appear why it was necessary for eight persons to hold him down.

[13] The news of the occurrence must have spread like wild fire and so also the names of the assailants, if they had been identified by the eye-witnesses. It is in the evidence of Raj Bahadur Singh, Ticket Collector, Mirzapur, a witness examined under S. 540, Criminal P. C., that the murder was being talked about between 8 or 8-30 and 9 p. m. at the tea stall on the platform at Mirzapur Railway Station.

[14] The first information report was made at about 7-30 P. M. The Sub-Inspector went to the place of occurrence at 8-30, and is said to have remained at the spot till 11 or 11-30, and it was at the spot that he had recorded the evidence of the four eye-witnesses for the prosecution. He did not, however, start making any arrest till he had examined Munai Barai at about midnight. We do not know the exact time of the arrest, but seven of the accused were arrested



at their houses after midnight and before 6 O'clock in the morning.

[15] Makund Lal was arrested under peculiar circumstances. He was detected by Mul Singh, Travelling Ticket Collector, as travelling without ticket by the 2 Down Mail between Allahabad and Mirzapur on the evening of the 18th. The train on that night had reached Allahabad at 8.50 P. M. and had left at 9.52. There is no stoppage between Allahabad and Mirzapur. He was found in a third class compartment towards the front portion of the train, and when asked he gave his name as Kedar Nath. There is some mystery as to why he should have given his name as Kedar Nath. The learned Government Advocate has stated that it is the case for the prosecution that Makund Lal had never come to Allahabad; that he had gone direct from Bindhyachal to Mirzapur railway station where he was arrested, and that Mul Singh's statement that he had seen him in the train between Allahabad and Mirzapur is false. Alternatively he has suggested that Makund Lal may have come to Allahabad by the evening passenger train from Bindhyachal and may have been travelling by the 2 Down Mail to Mirzapur in order to create evidence of an *alibi*. Makund Lal's defence is that he had gone to Cawnpore in the morning, that he was coming back by this train without ticket, and that he was handed over to the police at the Mirzapur station for travelling without ticket as he had no money to pay the railway fare and the penalty. If Makund Lal was trying to create an *alibi* evidence, it is surprising that he should have attempted to conceal his identity by giving his name as Kedar Nath.

[16] we have checked the timings from the time table and we find that No. 121 Up passenger leaves Bindhyachal at about 6.40 in the evening and reaches Allahabad at about 8.52. If the murder was committed before 6.30 p. m. it was possible for a person to catch this train at the Bindhyachal station and come to Allahabad and then catch the 2 Down Mail for Mirzapur. Bindhyachal station is, however, so near the place of occurrence that it is difficult to believe that a murderer with blood-stained clothes will dare come to the station to board the train, specially as he had been recognised. It is said that Gugun had gone to the station soon after the murder to quench his thirst, and it must have been common knowledge at the Bindhyachal station that Dildil had been murdered and Makund Lal had murdered him. It is difficult to believe that under those circumstances Makund Lal would dare to come to the station where there were a number of police men on duty who could easily have apprehended him. The other suggestion by the learned Govern-

ment Advocate that Makund Lal had gone to Mirzapur and was trying to prepare *alibi* evidence at the station is still more difficult to believe. It is said that a distant relation of a Ticket Collector, Mukhtar Ahmad, at Mirzapur is a friend of Gulab Chand, one of the accused, and it was through this Mukhtar Ahmad that the case that Makund Lal was travelling without a ticket and was detected between Allahabad and Mirzapur was prepared. We can find no justification for this suggestion.

[17] At the time of the occurrence Makund Lal, it is said, was wearing a cotton *benian* and a *dhoti*. 'At the time when he was arrested at Mirzapur Station he had a *kurta* on over the *banian*, but his *banian* and the *dhoti* were said to be blood-stained. It is unlikely that a man who had committed a murder, and who had still blood-stained clothes on, would take the risk of coming to the Mirzapur station and getting himself arrested by the police. There is no evidence from where the accused got this *kurta*. Some reliance appears to have been placed by the learned Sessions Judge on the blood-stains on his *dhoti* and *banian*. It is true that in the recovery list, Ex. P 3, it is mentioned that blood-stains were found at seventeen places on the *dhoti* and ten places on the *banian*, but no evidence was given to that effect in any of the Courts below.

[18] From the report of the Chemical Examiner, which is acceptable as evidence under the law, the *dhoti* had three minute blood stains and the *banian* had one. The blood-stain on the *banian* was disintegrated and the Imperial Serologist was not able to determine its origin. From the way that the murder was committed it appears to us to be most unlikely that Makund Lal should have got only four minute blood-stains—if it is taken that the stain on the *banian* was a blood-stain—on his clothes. He should have got big patches marked with blood, as the post mortem report shows that Dildil had as many as eight incised wounds on his head and face which must have caused a lot of bleeding, and blood must have spurted out from several of the wounds.

[19] Though Makund Lal had before the Magistrate said that he was not in Bindhyachal, no attempt was made by the prosecution to prove by any independent evidence, besides of course the evidence of the persons mentioned above who had deposed to the murder, that he was at Bindhyachal. This should have been very difficult to prove. There is further no explanation why the railway police, who were within one hundred to one hundred and fifty steps of the place of murder, did not rush to the spot on hearing about it and why no cry for help was made by any of the eye-witnesses. It is in the evidence that Patengra Nala is one of the places



frequented by the residents of Bindhyachal for answering calls of nature in the afternoon. There must have been several persons present at the Nala as also at the railway station where a train was due to arrive. No such witnesses have been produced.

[20] There is in criminal cases a tendency unfortunately to proceed from the first information report and to confine the proof only to the facts mentioned in that report. No attempt was made in this case to enquire into or to prove the various facts relating to the deceased and the accused from which it might have been possible to establish that the accused were guilty.

[21] We find it difficult to believe that Makund Lal soon after having committed the murder would go in blood stained clothes either to the Bindhyachal Railway Station or to the Mirzapur Railway Station, and if he had been trying to create *alibi* evidence, it is still more surprising that he should have tried to hide his identity and give his name as Kedar Nath. There seems to be no reason for disbelieving the evidence of Mul Singh that the appellant was detected as travelling without ticket. The fact that he was handed over to the police at the Mirzapur Station as a person travelling without ticket is borne out by the evidence of a number of witnesses examined by the learned Sessions Judge under S. 540, Criminal P. C. There is no doubt the possibility, if the murder was committed early enough, that Makund Lal could have walked to the next railway station, Birohi, three miles from Bindhyachal, and caught the passenger train there, but in that case why he came back the same night to Mirzapur and did not remain at Allahabad or Cawnpore and create *alibi* evidence at those places is another of the mysteries that remains unsolved.

[22] Under S. 342, Criminal P. C., it is the duty of the learned Sessions Judge to question the accused generally on the case after the witnesses for the prosecution have been examined. The object of this examination is to afford the accused an opportunity of explaining any circumstances appearing in the evidence against him, and it is, therefore, incumbent on the Court to draw the attention of the accused to all the important points upon which evidence has been given by the prosecution and which will, in the absence of an explanation, tell against him. Unfortunately there is an increasing tendency to put to the accused three or four stereotyped questions in this form: (1) Is this the statement made by you before the Committing Magistrate? (2) Do you wish to add anything to that statement? (3) Why have the

prosecution witnesses given evidence against you? (4) Do you want to produce any defence? This Court has more than once drawn the attention of learned Sessions Judges to the fact that although they must not cross-examine the accused, they must put such questions to him as will afford him the opportunity of explaining the circumstances appearing in the evidence against him. They must in particular draw the attention of the accused to those circumstances which appear for the first time, or in a more extended form, in the evidence adduced by the prosecution at the Sessions trial, as these are circumstances in respect of which the accused could not be expected to give any explanation when examined by the Committing Magistrate. In this case we regret to observe that questions not dissimilar to those mentioned above were put to the accused, and that the latter was not given that full opportunity to explain the circumstances appearing against him as is contemplated by S. 342, Criminal P. C.

[23] Coming back to the direct evidence of the four witnesses, the learned Sessions Judge had the benefit of marking the demeanour of the witnesses, Mangru and Gugun, and as he was not satisfied with their demeanour and they created an unfavourable impression on his mind, we would not *prima facie* be justified in relying on their evidence. Their evidence has been read out to us, and we agree with the learned Sessions Judge's estimate of its worth. Mangru is aged only nineteen and he started his career of being a witness for the prosecution at the age of fourteen and since then he has given evidence in about a dozen cases. The other witness, Gugun, lives near the police Kotwali and has been appearing as a witness for the prosecution in a number of cases. It is true that the learned Sessions Judge could, under S. 283, Criminal P. C., rely on the evidence of Mahabir in the Court of the Committing Magistrate, but in view of the fact that he now denies that he saw the occurrence or that he was present at the spot when the murder took place, it would be unsafe to place much reliance on his evidence. We are, therefore, practically left with the evidence of Shital, a servant of the deceased. He may have seen the murder committed, but at the same time it is possible that he has only heard of it and is pretending that he actually saw it. While on the one hand we have the evidence of Shital, on the other, we have the evidence of the railway witnesses who were examined by the learned Sessions Judge under S. 540, Criminal P. C., which makes it doubtful whether Makund Lal could have been one of the murderers. There is the further fact that Shital Singh named ten persons as



the assailants of Dildil when it is very unlikely that all the ten could have taken part in the murder, as deposed to by him, and that as many as eight persons against whom he gave direct evidence were acquitted by the learned Sessions Judge. Under the circumstances we consider that the evidence for the prosecution is not such that we can uphold the conviction and the sentence of death on the appellant, Makund Lal.

[24] It is a tragedy that a gruesome murder like the present should be committed in daylight, on the outskirts of a town and within a hundred and fifty paces of a police outpost, and that yet there should not be sufficient evidence to establish beyond doubt the identity of the murderer or murderers. The responsibility for this unsatisfactory state of affairs must, in our opinion, be shared alike by the public which is reluctant to give evidence and the police whose investigation of the crime was inadequate.

[25] The result, therefore, is that we allow this appeal, set aside the conviction and the sentence and direct that the appellant be released forthwith unless wanted in connection with some other case.

N.S.D.

*Appeal allowed.*

### A. I. R. (34) 1947 Allahabad 429 [C. N. 164.]

SHANKER SARAN AND RAGHUBAR  
DAYAL JJ.

*Dasi Ram and another — Applicants v. Emperor.*

Criminal Revn. No. 291 of 1946, Decided on 1-11-1946, from order of Sessions Judge, Shahjahanpur, D/- 22-12-1946.

(a) Evidence Act (1872), S. 35—Public document—Register of births maintained at Police Station—Admissibility of entries therein.

A register of births maintained at the Police Station under para. 322, Police Regulations, 1942 Edition, being a public document made by a public servant in the discharge of his official duties, entries in this register are admissible in evidence under S. 35 and it is not necessary to prove who wrote those entries and what his source of information was: 12 A.I.R. 1925 All. 79, *Foll. Case law discussed.* [Paras 4, 5, 6 and 14]

(b) Evidence Act (1872), S. 35—Extract from Chaukidar's birth register—Entry not made by Chaukidar—Extract is inadmissible. [Para 16]

*Cases referred:—*

1. ('45) 32 A. I. R. 1945 Pat. 489, Sanatan Senapati v. Emperor.
2. ('22) 9 A. I. R. 1922 All. 510 : 77 I. C. 52 : 20 A. L. J. 601, Sheo Balak v. Gaya Prasad.
3. (13) 19 I.C. 528 (All.), Jiwan Baksh v. Khan Bahadur Khan.
4. ('11) 10 I. C. 713 : 14 O. C. 68, Sampat v. Gauri Shankar.
5. ('36) 23 A. I. R. 1936 All. 218 : 159 I. C. 190 : 1936 A. L. J. 404, Mt. Anwari Jan v. Baldua.

6. ('38) 25 A. I. R. 1938 All. 242 : 175 I. C. 263, Mt. Komal v. Gur Charan Prasad.
7. ('24) 22 A. L. J. 690 : 12 A. I. R. 1925 All. 79 : 46 All. 637 : 87 I.C. 938, Shib Deo Misra v. Ram Prasad.
8. ('14) 12 A. L. J. 945 : 1 A. I. R. 1914 All. 99 : 24 I. C. 540, Baldei v. Abhey Ram.
9. ('19) 6 A. I. R. 1919 Oudh 426 : 22 O. C. 124 : 52 I.C. 162, Mt. Zaibunissa v. Mt. Hasaratunnissa.
10. ('19) 6 A. I. R. 1919 Oudh 75 : 22 O. C. 250 : 54 I. C. 166, Mohammad Jafar v. Emperor.
11. ('34) 21 A. I. R. 1934 Oudh 167 : 148 I. C. 418, Jai Bhagwan v. Guttoo.
12. ('18) 41 Mad. 26 : 5 A. I. R. 1918 Mad. 451 : 41 I. C. 286, Ramalinga Reddi v. Srigiriraju Kotayya.
13. ('19) 46 Cal. 152 : 6 A. I. R. 1919 Cal. 721 : 46 I.C. 237, Tamijuddin Sarkar v. Tazu.
14. ('33) 20 A. I. R. 1933 Pat. 473 : 149 I. C. 129, Madho Saran Singh v. Mannalal.

*Jagdish Sahai*—for Applicants.

*Deputy Government Advocate*—for the Crown.

**Raghubar Dayal J.**—Dasi Ram and his son, Chandra Gupta, were convicted under the Child Marriage Restraint Act and sentenced to different sums of fine. They appealed to the Sessions Judge, Shahjahanpur. The learned Sessions Judge set aside the conviction and sentence and directed a fresh trial. Dasi Ram and Chandra Gupta have filed this revision, which is referred to this Bench, as a single Judge was of opinion that it involved the decision of an important question.

[2] The learned Sessions Judge observed in the judgment :

"Dev Dat, complainant, filed a copy of the birth register of the village *chaukidar* to prove that the date of Mt. Ganga Dei's birth was 13-11-1932. Neither he nor his other witnesses had any personal knowledge of the age of the girl. Dev Dat stated that by appearance the girl seemed to be about 12½ years old at the time of her marriage. This statement can have little evidentiary value. Dev Dat is not an expert in judging ages. In A. I. R. 1945 Pat. 489, it was held that the *chaukidar*'s birth register is not admissible in evidence under S. 35, Evidence Act. . . . In the absence of any admissible prosecution evidence to prove that the age of the girl was less than 14 years, it would not be safe to convict the appellant."

In view of this opinion the learned Sessions Judge would have been justified in acquitting the appellant before him. He, however, ordered a retrial as he thought that the complainant might have produced other evidence to prove the age had the learned Magistrate not admitted the extract of the birth register in evidence. It does not appear that the learned Magistrate had expressed his opinion before the conclusion of the case that he would rely on the extract from the birth register and that, therefore, it was futile for the complainant to lead any further evidence. Moreover, any further evidence which the complainant might have led would have been probably oral. Witnesses can only depose their estimate of the girls age. In the words of the learned Sessions Judge, such witnesses cannot be experts in judging ages. It is open to argument how far the opinion of a lay man about



age is admissible. It may be that probably the learned Sessions Judge had in his mind the possibility of the complainant's examining a doctor. A doctor too estimates ages and it is open to the Court to believe him or not. In this view of the matter, we are of opinion that the order of retrial was not a proper order.

[3] We are, however, of opinion that the learned Sessions Judge misdirected himself on the admissibility of the extract from the birth register and that therefore his order under revision is not a proper order.

[4] The learned Sessions Judge does not appear to be correct in describing the birth register extract to be an extract from the birth register of the village *chaukidar*. We have seen this extract. It is a true copy. The very fact that it is a true copy indicates that it is probably not an extract from the *chaukidar's* birth register as that register is kept by the *chaukidar* and, so far as we know, copies are not issued from it. The detailed columns of this extract also indicate that it is not a copy from the *chaukidar's* register, which is a small book. The probability is as urged by the learned Government Advocate, that this is an extract from the register maintained at the *thana* and in which entries are made from the entries in the *chaukidar's* register at the time when the *chaukidar* visits the *thana* once a fortnight ordinarily. Such a register is a public document. Entries are made in it by an employee of the police department. Entries in this register are admissible under S. 35, Evidence Act.

[5] The learned counsel for the applicant has argued that entries in the *thana* register of births and deaths are not admissible under S. 35, Evidence Act, unless it is proved as to who wrote those entries and what his source of information was. In support of his contention he has referred to some cases, the last of which is reported in A.I.R. 1922 ALL. 510.<sup>2</sup> That according to him, was the latest case of the Allahabad High Court he could discover from the digest. We can only say that his digest seems to be too old and any way is not up to date, as we have found a number of cases of this Court subsequent to the year 1922. He chiefly relied on the case reported in 19 I. C. 528.<sup>3</sup> It was observed there :

"In our opinion the register has not been properly proved and the entries in it are not admissible in evidence. It was produced by a municipal clerk who was new to the work. The entries were not in his handwriting and he could not say who wrote them.

Neither could he say who was responsible for keeping up the register or on whose information the entries were made or who was responsible for checking their correctness. It is not shown that the entries in question were made by any public servant in the discharge of his official duties. We agree with the opinion expressed in 10 I. C. 713,<sup>4</sup> a very similar case."

It is presumed in his argument by the learned counsel for the applicants that the register referred to was a public document and that the clerk who probably wrote it was a public servant. The quotation shows that it was not proved that the entries were made by any public servant. In the circumstances the register could not have been admissible in evidence under S. 35, Evidence Act. There are two later cases of this Court which deal with entries in a municipal register. They are A.I.R. 1936 ALL. 218<sup>5</sup> and A.I.R. 1938 ALL. 242.<sup>6</sup> It was held in both these cases that under S. 35, Evidence Act, a municipal register of births and deaths is admissible in evidence as it is kept by a public servant in the discharge of his duty. In A. I. R. 1938 ALL. 242<sup>6</sup> it was observed at p. 245:

"In the present case the original was summoned, and we are of the opinion that the copy produced in this case is admissible in evidence. This was the view taken by this Court in 22 A. L. J. 690<sup>7</sup> and 1936 A.L.J. 404.<sup>5</sup> The entries in municipal records and police records stand on a different footing from the entries in a *chaukidar's* book, and the cases relied on by learned counsel for Khelari Das, namely 20 A. L. J. 601; A. I. R. 1922 All. 510<sup>2</sup> and 19 I. C. 528,<sup>3</sup> are distinguishable."

[6] The case reported in 46 ALL. 637,<sup>7</sup> is a complete answer to the contention for the applicants. It was held in that case that a daily register of deaths maintained at a police station in pursuance of regulations made under S. 12, Police Act, 1861, is an official book, register or record made by a public servant in the discharge of his official duty within the meaning of S. 35, Evidence Act, 1872, and entries therein are legally admissible as evidence.

[7] The earliest case referred to by the learned counsel was the case reported in 14, O. C. 69.<sup>4</sup> It was observed in that case :

"The entry in question was admittedly not made by the *chaukidar* and there is no evidence that it was made by any other public servant or that it was the duty of any other public servant to make it. Even if it be assumed that the register is a public or any other official book within the meaning of S. 35, Evidence Act, the register must be rejected on the ground that it was not shown that the entry in question was made by any public servant in the discharge of his official duty."

This case did not hold that when an entry is made in a public register by a public servant it is necessary that that public servant should come in Court and prove that he made the entry and state what his source of information was. If this had been the law, the whole object of S. 35, Evidence Act, would be frustrated. Doubts were expressed about this decision in the case reported in 12 A. L. J. 945.<sup>8</sup> Referring to this case it was observed at p. 947:

"It is there laid down that, although a *chaukidar's* register may be a public or official book, within the meaning of S. 35, Evidence Act, it cannot be put in evidence unless the entries are shown to have been made by the *chaukidar* himself."



[8] The case reported in A.I.R. 1919 Oudh 426,<sup>9</sup> held that an entry made in the register of deaths maintained under Para. 367 of the Police Regulations is an official entry made by a public servant in the discharge of his official duty and as such is admissible in evidence under S. 35, Evidence Act. It referred to the earlier Oudh cases. This case was followed in A.I.R. 1919 Oudh 75.<sup>10</sup> wherein it was held that under S. 35, Evidence Act, it is not enough to prove that the *chaukidar's* register is an official book, but it is also necessary to prove that any entry relied on in it was either made by a public servant in the discharge of his official duty or made by some other person in performance of a duty specially enjoined by the law of the country.

[9] In A.I.R. 1934 Oudh 167,<sup>11</sup> entries in a municipal register were held admissible in evidence.

[10] The Madras High Court held in 41 Mad. 26,<sup>12</sup> that the entries in a village register of births and deaths maintained under the orders of the Board of Revenue were admissible in evidence under S. 35, Evidence Act.

[11] The Calcutta High Court held in 46 Cal. 152,<sup>13</sup> that a register of deaths kept by police officers at *thanas* under the rules made by the Local Government is a 'public document' within the meaning of S. 74, Evidence Act. Under the provisions of S. 114 of that Act, the Court is entitled to presume that an entry made in such register was properly made and a certified copy of such entry is admissible in evidence.

[12] The Patna case, reported in A.I.R. 1945 Pat. 489,<sup>1</sup> relied on by the learned Sessions Judge, held that in the absence of reliable evidence as to who made the entry as to the death of a particular person in *hathchittas* kept by a *chaukidar* and in what circumstances, it cannot be said that the conditions laid down in S. 35 have been fulfilled. The circumstances of that case were peculiar. The *chaukidar* examined in Court was unable to say who had made the entry and on what date the particular person had died. The witness who was produced to depose that he had made the entry denied that he had made it and it appeared that the entry was not actually in his handwriting. It was observed in the body of the judgment at page 490, col. 2 :

"Therefore, for the application of S. 35, Evidence Act, one must know who has made the entry and in what circumstances. If the *chaukidar* or some other person makes the entry in the discharge of his official duty then one of the essential conditions mentioned in S. 35, Evidence Act, is fulfilled."

[13] Reference was made to the case reported in A.I.R. 1933 Pat. 473,<sup>14</sup> which held that such an entry is admissible in evidence. In that case the entry was not made by the *chaukidar* himself but was made at his instance by a *defadar*.

Thus, this Patna case too does not help the applicants if the entry is made in the *thana* register of births and deaths or if the entry is made in the *chaukidar's* register by the *chaukidar* himself.

[14] We are, therefore, of opinion that the register of births from which an extract has been filed appears to be the register of births maintained at the *thana* under para 322, Police Regulations, 1942 Edition, and that entries in this register are admissible in evidence under S.35, Evidence Act.

[15] In view of what we have said above, it is clear that the learned Sessions Judge misdirected himself on law. We are, therefore, of opinion that the revision should be allowed, the order of the Court below be set aside and that the case be sent back to the Court below with the direction that the appeal be reheard on merits and we order accordingly.

[16] The Court below is free to call for evidence, if it considers this necessary, about the fact whether this extract is from the birth register maintained at the *thana* or is from the *chaukidars's* book. We may note that if this extract be from the *chaukidar's* book and the entry be not made by the *chaukidar* himself this extract will be inadmissible in evidence.

V.R.

Order accordingly.

**A. I. R. (34) 1947 Allahabad 431 [C. N. 165.]**

VERMA C. J. AND WALI ULLAH J.

*Sri Narain Dube — Decree-holder—Appellant v. Jang Bahadur and others—Judgment-debtors—Respondents.*

Exn. Second Appeal No. 1097 of 1945, Decided on 26-9-1946, from decision of Addl. Civil Judge, Jaunpur, D/-4-1-1945.

(a) U. P. Regulation of Agricultural Credit Act (14 [XIV] of 1940), S. 12—Contract to sell property entered into and decree for specific performance thereof passed prior to Act—Attempt to get deed of conveyance by execution of decree after passing of Act—S. 12 applies.

Where a contract to sell the property is entered into and the decree for specific performance of that contract is passed before the passing of the Act, but an attempt is made by the decree-holder to get a deed of conveyance by means of execution of decree after the passing of the Act, S. 12 would be applicable to such execution and the reference to the date of the contract or to the date of the decree is irrelevant. [Para. 6]

(b) U. P. Regulation of Agricultural Credit Act (14[XIV] of 1940), S. 12—Deed of transfer to be executed in enforcement of decree for specific performance of contract to make transfer is 'voluntary alienation.'

The word "voluntary," in the heading of Chapter IV and in the preamble, has been used in the sense of a transfer brought about by act of parties, as opposed to a sale made by the Court in execution of a decree in



which case the Court sells the property. The execution of a deed of sale, either by the judgment-debtor or by the Court in the enforcement of a decree for specific performance is not a sale by the Court. What such a decree does is that it orders the party concerned to do what it had promised to do and it further states that, if the party concerned will fail to obey the order, the Court will execute the deed on behalf of that party. Even where the Court executes such a deed, it merely does what the party had been ordered to do and the transfer is still on behalf of the party, and not by the Court. [Para 8]

Hence a deed of transfer which has to be executed in consequence of the enforcement of a decree for the specific performance of a contract to make the transfer is a deed making a "voluntary alienation." [Para 7]

(c) U. P. Regulation of Agricultural Credit Act (14 [XIV] of 1940)—Act is remedial statute—It is duty of Courts to give effect to intention of Legislature.

The Act is a remedial statute and it is the duty of the Court to give effect to the intention of the Legislature. The intention of the Legislature is to prevent the transfer of certain classes of land. Hence the Court should prevent transfer of such land even if such transfer is sought to be effected by means of execution of decrees for specific performance of contracts to make transfers: 31 A. I. R. 1944 P. C. 35., *Rel. on.*

[Para 10]

Case referred:—

1. ('44) 19 Luck. 309; 1944 A. L. J. 162 : 31 A. I. R. 1944 P. C. 35; I. L. R. (1944) Kar P. C. 199; 71 I. A. 56; 213 I.C. 342 (P.C.), *Raghuraj Singh v. Hari Kishan Das.*

*Janaki Prasad*—for Appellant.

*N. R. Sharma*—for Respondents.

**Verma C. J.** — This second appeal has arisen out of proceedings for the execution of a decree which has been passed in favour of the appellant on 11-3-1939. Both the Courts below have dismissed the application for execution.

[2] The material facts are these. On 13-1-1935 one Mt. Mandodra made a contract in favour of the appellant Sri Narain Dube, agreeing to sell to him certain landed property. Instead, however, of fulfilling her promise by executing a deed of sale in the appellants' favour, she executed a sale deed, only two days later, that is, on 15-1-1935, in favour of four persons, namely, Jang Bahadur Singh, Ramayan Saran Singh *alias* Surat Singh, Uma Shanker Singh and a lady whose name we have been unable to decipher, in respect of the property which she had contracted to sell to the appellant. The appellant, on 12-1-1938, instituted a suit for the specific performance of the contract in his favour. He impleaded Mt. Mandodra, Jang Bahadur Singh, Ramayan Saran Singh *alias* Surat Singh and Uma Shanker Singh as defendants to this suit. As to the lady, who also figured as a vendee in the sale deed of 15-1-1935, it was stated in the plaint that she had died before the institution of the suit and that the defendant Jang Bahadur Singh was her sole heir and legal representative. There was no controversy with regard to this

matter in the Courts below. The suit ultimately ended in a compromise and on 11-3-1939, a petition was filed on behalf of the parties in which it was stated that the parties had entered into a compromise upon certain terms and it was prayed that a decree be passed in accordance with those terms. The material terms were contained in paragraphs 1 and 2 of the petition. In para. 1 it was stated that the parties had agreed that, out of the property which Mt. Mandodra had contracted to sell to Sri Narain Dube, the latter should get a one-third share, that Jang Bahadur Singh should get another one-third share and that Ramayan Saran Singh *alias* Surat Singh and Uma Shanker Singh should get the remaining one-third. In paragraph 2 it was stated that Jang Bahadur Singh, Ramayan Saran Singh *alias* Surat Singh and Uma Shanker Singh would, within two weeks execute at their own cost a sale deed in respect of a one-third share of the property in favour of Sri Narain Dube and would get it registered. It was further stated in this paragraph that if the persons aforesaid failed to execute the sale deed and to have it registered, Sri Narain Dube would be entitled to have the sale deed executed and registered by execution of the decree. The Court passed a decree in terms of the compromise. Jang Bahadur Singh, Ramayan Saran Singh and Uma Shanker Singh did not execute the sale deed which they had agreed to execute in favour of Sri Narain Dube within the time which had been allowed by the decree for the purpose or at any other time. Sri Narain Dube, accordingly, on 23-2-1942, filed an application for the execution of the decree passed on 11-3-1939. Ramayan Saran Singh *alias* Surat Singh had died before 23-2-1942, and the decree-holder Sri Narain Dube impleaded his sons as parties to the execution proceedings but did not implead his widow, who admittedly had survived her husband and was alive. Both the Courts below have agreed in dismissing the application for execution and the decree-holder has brought this second appeal.

[3] The Munsif dismissed the application on three grounds, (1) that the decree sought to be executed was vague as no consideration for the sale deed which had to be executed was mentioned in the compromise petition or the decree, (2) that the decree-holder was not entitled, in view of the provisions of S. 12, U. P. Regulation of Agricultural Credit Act, 1940, to have the sale deed executed and that the execution of the sale deed having been thus prohibited by statute, the execution application could not be granted, and (3) that, as the decree-holder had failed to implead Ramayan Saran Singh's widow, who admittedly was an heir under the the Hindu Women's Rights to Property Act



(18 [XVIII] of 1937), the application for execution was defective and could not be allowed.

[4] The decree-holder appealed and the learned Judge of the Court below, although he did not agree with the Munsif on the first and third points mentioned above, agreed in holding that the execution of the decree was prohibited by S. 12, U. P. Regulation of Agricultural Credit Act, 1940. It may be mentioned here that it was admitted in the Courts below, and is admitted here, that the property in question is "protected land" within the meaning of the U. P. Regulation of Agricultural Credit Act.

[5] Having heard learned counsel for the parties, we have come to the conclusion that the decision, that the execution of the decree was barred by S. 12, U. P. Regulation of Agricultural Credit Act, 1940, is correct, and that the order dismissing the execution application must therefore be upheld. In this view of the matter, we do not consider it necessary to express any opinion with regard to the other two grounds on which the Munsif had based his decision.

[6] It appears from the judgments of the Courts below that the argument which had been addressed to those Courts on behalf of the decree-holder, Sri Narain Dube, was that, as the contract to sell the property had been entered into in 1935 and the decree had been passed in 1939—that is, before the passing of the U. P. Regulation of Agricultural Credit Act—S. 12 or any other provision of the Act was not applicable to the present execution proceedings. Learned counsel here has, somewhat half-heartedly, repeated that argument before us. The argument is, however, obviously incorrect. It cannot be denied, and has not been denied, that it is open to the Legislature to prevent such alienations of such property as it may deem fit. It is clear that the object of the execution application is to have a deed of conveyance brought into existence by which such property, as is mentioned in S. 12 of the Act, would be transferred to the decree-holder. The attempt to gain that object was made after the Act had come into force. Reference to the date of the contract or to the date of the decree is, in these circumstances, irrelevant.

[7] Learned counsel, however, has put forward a new argument before us. He has pointed out that S. 12 is in Chap. 4 of the Act and that that chapter is headed "Voluntary Alienation of Protected Land". He has also referred to the preamble to the Act where it is stated that one of the reasons for considering it expedient to make the Act was "to restrict the voluntary alienation of land." He has emphasised the word "voluntary" and has argued that a deed of

transfer which has to be executed in consequence of the enforcement of a decree for the specific performance of a contract to make the transfer is not a deed making a "voluntary alienation." It appears to us, however, that this argument is not well-founded.

[8] After examining the scheme and the various provisions of the Act, it seems to us clear that the word "voluntary," in the heading of Chap. 4 and in the preamble, has been used in the sense of a transfer brought about by act of parties, as opposed to a sale made by the Court in execution of a decree in which case the Court sells the property. Such sales by the Court are dealt with in Chap. 3 of the Act which is headed "Execution of Decrees." To say that the execution of a deed of sale, either by the judgment-debtor or by the Court in the enforcement of a decree for specific performance, is a sale by the Court is, in our judgment, to misunderstand the nature of a decree for specific performance. What such a decree does is that it orders the party concerned to do what it had promised to do, and it further states that, if the party concerned will fail to obey the order, the Court will execute the deed on behalf of that party. Even where the Court executes such a deed, it merely does what the party had been ordered to do and the transfer is still on behalf of the party, and not by the Court. In this view of the matter, the argument which has been sought to be based on the word "voluntary" cannot be accepted.

[9] It, further, appears to us that the very preamble to which learned counsel has referred makes the matter clear. It will be convenient here to reproduce the relevant portion of the preamble:

"Whereas it is expedient to prevent excessive borrowing by agriculturists and for this purpose to limit the amount that can be obtained by execution of decrees against agricultural produce and land and to restrict the voluntary alienation of land:

\* \* \* \* \*

Now, therefore, the Governor in exercise of "the powers aforesaid is pleased to make the following Act": In our judgment, the first half of the first paragraph quoted above clearly shows that the Act has in contemplation transfers of land in two ways, (1) in execution of decrees for the purpose of obtaining amounts due on account of borrowings by agriculturists and (2) by the execution of a deed by or on behalf of the owner of the land. The first is dealt with in Chap. 3 and the second is dealt with in Chap. 4.

[10] Even if it be conceded, which we are far from doing, that the language of the Act is not as clear as it might have been, the intention of the Legislature is perfectly clear. That intention is to prevent the transfer of certain classes of



land. The transfer of such land by attachment and sale in execution of a decree is dealt with in Chap. 3 and the transfer by deed, executed by or on behalf of the owner of the land, is dealt with in Chap. 4. It is true that the framers of the Act did not, in so many words, deal with the execution of decrees for the specific performance of contracts to make transfers. The intention, however, being clear, and the true nature of a decree for specific performance being, in our opinion, what we have stated above, it appears to us that it is the duty of the Courts to give effect to the intention of the Legislature. Reference may, in this connection, be made to the following observation of their Lordships of the Privy Council in 19 Luck. 309 : 1944 A. L. J. 162.<sup>1</sup>

"The words of a remedial statute must be construed, so far as they reasonably admit so as to secure that the relief contemplated by the statute shall not be denied to the class intended to be relieved."

That the United Provinces Regulation of Agricultural Credit Act, 1940, is a statute of the nature mentioned by their Lordships is obvious.

[11] In the course of arguments reference was made to the definition of "loan" given in cl. (6) of S. 2 of the Act. We have not, however, been able to understand the argument sought to be based on that definition. The definition had to be given because of the first half of the first paragraph of the preamble quoted above. For the reasons given above, we dismiss this appeal with costs.

D.S.

*Appeal dismissed.*

**A. I. R. (34) 1947 Allahabad 434 [C. N. 166.]**  
HARISH CHANDRA J.

*Ram Prasad and another — Appellants v. Emperor.*

Criminal Appeal No. 239 of 1946, Decided on 18-3-1947, from order of Addl. Sessions Judge, Jaunpur, D/- 6.3.1946.

Penal Code (1860), Ss. 34 and 304 — Case falling under second part of S. 304 — Section 34 if can be applied.

It is not correct to say that S. 34 cannot properly be applied to a case falling under the second part of S. 304. Whether S. 34 can be applied or not would depend upon the facts of each case : 30 A. I. R. 1943 All. 271 and 12 A. I. R. 1925 Cal. 913, *Dissent*.

[Para 5]

The common intention of the two accused was to prevent forcibly the field of A from being ploughed and they assaulted A, an old man of 75 years, with lathis in furtherance of their common intention, in consequence of which he died.

*Held* that the deceased being a very old man the accused must be deemed to have acted with the knowledge that their act was likely to cause death and as they assaulted him in furtherance of their common intention they were guilty under S. 304, second part read with S. 34 : 33 A. I. R. 1946 Oudh 250, *Expl.*

[Para 5]

*Cases referred :—*

1. ('43) 30 A. I. R. 1943 All. 271 : 207 I. C. 158, *Ram Nath v. Emperor.*
2. ('25) 12 A. I. R. 1925 Cal. 913 : 86 I. C. 475, *Anirudha Mana v. Emperor.*
3. ('46) 33 A. I. R. 1946 Oudh 250 : 21 Luck. 527 : 225 I. C. 308, *Gajraj Singh v. Emperor.*

*C. S. Saran and Shiva Prasad Sinha — for Appellants.*

*Deputy Government Advocate — for the Crown.*

**Judgment.** — Ram Prasad Singh and Salik Singh, father and son, residents of village Khampur in police circle Baksa in the district of Jaunpur, were prosecuted along with one Tinmin Singh, a nephew of Ram Prasad Singh, under ss. 323 and 302, read with S. 34, Penal Code. Tinmin Singh was acquitted by the learned Sessions Judge of Jaunpur. The appellants were also acquitted of the charge under S. 302, read with S. 34, Penal Code, but he convicted them under ss. 323 and 304, read with S. 34, Penal Code, and sentenced them each to one year's and five years' rigorous imprisonment respectively for the two offences. The two sentences have been ordered to run concurrently.

[2] The complainant Mahadeo Singh and his brother Ram Sunder Singh deceased belonged to village Karchuli in police circle Machhlisahar in the district of Jaunpur. Village Karchuli is situated at a distance of about two miles from village Khampur. The appellants and the complainant are descended from common ancestors, the father of the complainant Mahadeo Singh being a brother of the grandfather of the appellant Ram Prasad Singh. The families have been separate since a long time, but certain khata in the two villages are still common although the fields are in the separate possession of the two families and are cultivated separately by them.

[3] The prosecution case is that on 7.7.1945 in the morning plot 30 situated in village Karchuli was being ploughed by one Matai, a ploughman of the complainant and the deceased Ram Sunder Singh, who was an old man aged about 75 years, was standing by. This plot is also part of a joint khata of the complainant and the appellants. But admittedly it was in the separate cultivation of the complainant and the deceased. About two hours after sunrise the appellants accompanied by Tinmin Singh arrived and stopped Matai from ploughing the field. When Ram Sunder Singh protested, he was beaten by them with lathis and felled to the ground. Mahadeo Singh was grazing his she-buffaloes at some distance from the scene of occurrence. On hearing the shouts of the deceased and Matai, he ran to the scene of occurrence and in order to save his brother struck the appellants with his *danda*. The appellants then



started beating Mahadeo Singh with their lathis and felled him also to the ground. In the meanwhile a number of persons arrived on the scene of occurrence and the assailants ran away. The deceased was unconscious and Mahadeo Singh had also received numerous injuries and was not in a fit condition to go to the thana. It is said that he too had become unconscious. Matai was accordingly sent to the thana, which is at a distance of about 10 miles from the scene of occurrence, and he made a report there at 4 o'clock in the afternoon and stated all these facts. The first information report is Ex. P.1, on the record. Ram Sunder Singh expired after about an hour after the occurrence. The station officer proceeded to village Karchuli, prepared a sketch map of the scene of occurrence and held an inquest on the dead body of the deceased and after completing the investigation sent up the appellants along with Tinmin Singh for trial with the result already mentioned above.

[4] The appellants pleaded not guilty. Their case is that Ram Prasad Singh was cutting his own Babul tree standing in a field north of plot 30 which is under the exclusive cultivation of the appellants. Ram Sunder Singh deceased objected and struck Ram Prasad Singh with his *danda*. Ram Prasad Singh then struck the deceased in return. Mahadeo Singh also arrived and then there was a free lathi fight between Mahadeo Singh and the deceased on the one side and the appellants on the other. [After considering the evidence of the prosecution and defence witnesses his Lordship proceeded.]

[5] For the reasons given above, I am satisfied that the learned Sessions Judge has come to the right conclusion and that the *marpit* occurred substantially in the manner alleged on behalf of the prosecution. I may add that assuming that the *marpit* occurred in the manner alleged by the defence, the large number of injuries received by Mahadeo Singh and the severe injuries that were caused to the deceased who, it will be remembered, was an old man of about 75 years, would seem to indicate that even if the appellants had any right of private defence, it was far exceeded by them. It is further argued on behalf of the defence that in view of the decision in A. I. R. 1943 ALL. 271,<sup>1</sup> S. 34 cannot be properly applied to a case falling under Part 2 of S. 304, Penal Code. With all respect I do not agree with the view expressed by a learned Judge of this Court in that case. Whether S. 34 can be applied or not would depend upon the particular facts of each case. In the present case if the prosecution evidence is believed, the two appellants were obviously acting in furtherance of the common intention of both when they assaulted the de-

ceased and Mahadeo Singh and forcibly prevented their field from being ploughed by their halwaha. The deceased Ram Sunder Singh was a very old man and they would, therefore, also be presumed to have known that in assaulting him with lathis they were doing an act which was likely to cause death. In the circumstances, I see no difficulty in the application of S. 34 to the facts of the present case. My attention has also been drawn to the Calcutta case in A. I. R. 1925 Cal. 913.<sup>2</sup> The judgment in that case was delivered by Walmsley J., who thought that S. 34, could not only not be applied to a case under Part 2 of S. 304, which expressly excludes intention but also to a case under Part 1, "except possibly in very rare cases." But his judgment does not contain any further discussion of the matter and the reasons which led him to this conclusion are not clear. In an Oudh case in A. I. R. 1916 Oudh 250,<sup>3</sup> it was found that out of the four accused who beat the deceased with lathis it was not certain as to who struck the fatal blow and the common intention of them was, as shown by the circumstances, only to break him up in such a way as legally amounted to grievous hurt and not to kill him. In the circumstances, it was held that the accused could not be convicted of murder but only under S. 325, read with S. 34. But in the present case the common intention of the appellants, as appears from the evidence and the circumstances of the case, was to prevent forcibly the field of the deceased and Mahadeo Singh from being ploughed and the assault that they committed upon the deceased was apparently in furtherance of their common intention. As I have just said the deceased being a very old man they would, in the circumstances of the present case, be deemed to have acted with the knowledge that their act was likely to cause death and there seems to be no reason why, in the circumstances of the present case, the appellants cannot be held liable under S. 304, Part 2, read with S. 34, Penal Code.

[6] I am accordingly of opinion that the appellants have been rightly convicted. Having regard to all the circumstances of the case, I do not think that the sentences passed upon them are too severe. I accordingly maintain the convictions and the sentences passed upon the appellants and dismiss the appeal. The appellants will surrender to their bail and undergo the unexpired portions of their sentences.

G.N.

*Appeal dismissed.*



A. I. R. (34) 1947 Allahabad 436 [C. N. 167.]

MALIK J.

*Kailash Nath Agarwal and another—Applicants v. Emperor.*

Criminal Misc. Case No. 1290 of 1946, Decided on 7-2-1947.

(a) Criminal P. C. (1898), S. 340 — Proceedings under Chapter 18 — Right of accused in custody to be defended by pleader.

The proceedings under Chapter 18 are in the nature of judicial proceedings in a Criminal Court and persons who are accused of an offence are entitled, as a matter of right, to be defended by a pleader. A Magistrate is, therefore, bound to give to the accused sufficient facility to be represented by a lawyer, specially when they are in custody from the time that they had been arrested and accused of an offence. [Para 18]

('46-Com.) Cr. P. C., S. 340, N. 2.

(b) Criminal P. C. (1898), S. 340 — Recording examination-in-chief without giving accused opportunity to get legal assistance — Validity.

The examination-in-chief and the manner in which the evidence is recorded are just as important, at times more so, as the cross-examination, and a Magistrate should not record the examination-in-chief of the witnesses without giving an opportunity to the accused to get adequate legal assistance: 12 A. I. R. 1925 Mad. 1153, *Ref.* [Para 19]

('46-Com.) Cr. P. C., S. 340, N. 2.

(c) Criminal P. C. (1898), S. 352 — Trial in jail — Right of public to have access — Regulation by jail authorities — Magistrate's duty.

There is no provision in the Criminal P. C. which compels a Magistrate to hold his Court in the usual Court room. Section 352 probably contemplates that a Magistrate can hold his Court anywhere he likes. But the Magistrate, wherever he may be compelled to sit by executive orders, is bound by the provisions of S. 352 and he must realise that the place where the trial is held must be something like an open Court to which the public generally may have access so far as the same can conveniently contain them. The discretion to exclude the public generally or any particular person at any stage of any enquiry or trial must be a judicial discretion exercised by him. Though it is not illegal for the Magistrate to hold the enquiry in jail or anywhere else, the Magistrate must realise that the place where the enquiry is held must be deemed to be an open Court where the public as such have a right to attend and that such right may be controlled in a proper case on special grounds by the Court and not by the jail rules or by the officer in charge of jail. If the Magistrate cannot have the absolute right to regulate the proceedings at the place where he is holding the trial he ought not to hold the trial or the enquiry at such a place. [Paras 22 and 25]

('46-Com.) Cr. P. C., S. 352, N. 2.

(d) Criminal P. C. (1898), S. 352 — Trial in jail — Facilities for members of bar — Bench and bar — Seats for members of bar.

Though a Magistrate may hold his enquiry anywhere, e.g. in a jail, he owes a duty to see that proper facilities are given to the members of the Bar. No lawyer can do his duty to his client, nor can a Magistrate discharge his duties as such, in a room where the Magistrate sits in one corner with the Prosecuting Inspector on one side and the Reader on the other, all the three of them having chairs, with members of the Bar standing in front as suppliants for his favours. [Para 26]

('46-Com.) Cr. P. C., S. 352, N. 2.

*Cases referred:—*

1. ('26) 50 Bom. 741 : 13 A. I. R. 1926 Bom. 551 : 97 I. C. 801, *In re Llewelyn Evans.*

2. ('25) 12 A. I. R. 1925 Mad. 1153 : 91 I. C. 65, *Mannargan v. Emperor.*

3. ('38) 25 A. I. R. 1938 Rang. 198 : 175 I. C. 350, *U Po Mya v. The King.*

4. ('17) 4 A. I. R. 1917 Lah. 311 : 41 I. C. 820, *Sahai Singh v. Emperor.*

5. ('1913) 1913 A. C. 417 : 82 L. J. P. 74 : 109 L. T. 1, *Scott v. Scott (No. 1).*

A. P. Pandey — for Applicants.

Government Advocate — for the Crown.

**Order.** — This is an application to transfer a case pending in the Court of Mr. J. H. Zaidi, Second Additional District Magistrate of Allahabad, to the Court of some other Magistrate competent to try the case.

[2] The facts of the case briefly are that during the recent communal disturbances in Allahabad a man was stabbed on the Kamta Prasad Kakkar Road at about seven in the morning of 5-11-1946. The incident is alleged to have taken place near the house of one Mr. Kedar Nath, who is a Mukhtar practising in the revenue Courts. The applicants, Kailash Nath Agarwal and Amar Nath Agarwal, sons of Kedar Nath, were arrested in their house by Muhammad Yakub, Sub-Inspector, about an hour after the incident. Two other persons were also arrested along with them. Kailash Nath Agarwal is a Pleader practising in the district Court, while Amar Nath Agarwal is a LL. B. student of the Allahabad University. They were taken to the Police Kotwali and then to the Colvin Hospital where the identification proceedings took place and were then lodged in the Malaka Jail. It is alleged that a knife and a shirt were also taken into custody and were sent to the Chemical Examiner and Imperial Serologist for examination, to find out if there were any marks of human blood on those articles.

[3] The applicants were not released on bail and were kept in the Malaka Jail on a charge under S. 302, I. P. C.

[4] On 8-11-1946, the learned Magistrate Mr. J. H. Zaidi, went to the Jail to hold an enquiry under Chap. 18, Criminal P. C., before committing the applicants for trial to the Court of Session.

[5] It is admitted that no information of that date or of the intention of the learned Magistrate to hold the enquiry on that date was given to the accused.

[6] Kedar Nath had, however, heard some rumour that an enquiry may be held on that date and he had, therefore, gone to the Jail. When he found Mr. Zaidi there ready to hold an enquiry under Chap. 18, Criminal P. C., he filed an application praying for adjournment for two weeks on the ground that no information of the date was given to the accused or to any one on their behalf and they had, therefore, not



engaged any lawyer and he wanted a little time to engage a lawyer. It was further mentioned that an application for copies of the first information report, the injury report, the statements under S. 164, Criminal P. C. and the dying declaration etc. had been filed on the 7th, but copies of the said statements had not till then been issued and that it would be, in the interest of justice, if the enquiry was held after the copies had been obtained.

[7] The application was rejected by the learned Magistrate who passed the following order :

"The accused can get copies of the papers and file them later on. I will allow them. I am afraid the case cannot be postponed."

[8] Learned counsel in support of the application has made a point that the learned Magistrate did not apply his mind and did not realise that the copies were not being obtained for the purpose of being filed but for the purpose of proper prosecution of the case. It is further urged that the learned Magistrate was bound to give proper facilities to the accused to obtain legal aid.

[9] A further request being made to the learned Magistrate for a shorter adjournment to enable the accused to get legal aid, the learned Magistrate passed the following order:

"I can, however, do one thing. It is that I can allow as a special case to let the defence counsel cross-examine the witnesses."

The learned Magistrate then proceeded to record the examination-in-chief of the witnesses for the prosecution.

[10] It is urged by learned counsel that by reason of the fact that the evidence of the prosecution witnesses was recorded in the absence of any lawyer on behalf of the accused, an examination of the statements of the witnesses would show that many matters which were not relevant were included in the statements of the witnesses. It is further alleged that improper questions were put in the examination-in-chief and the evidence was not properly recorded as the Magistrate translated the statements in his own words and then dictated the same to the stenographer and to the peshkar. I have not allowed learned counsel to go further in this matter, nor have I examined the statements for myself, as I consider this is not the stage at which I should express any opinion on the merits.

[11] After the learned Magistrate had recorded the evidence-in-chief of two witnesses for the prosecution, Abdul Rauf and Shafat Ahmad, a third witness, Mr. Saidullah, Magistrate, was to be produced. Some objection was taken by the accused to the relevancy of the evidence of the third witness, and on the Magistrate asking

them to substantiate the same, a short adjournment of three days was given by him at the request of the accused.

[12] Mr. A. P. Pandey, a senior advocate practising in this Court, was engaged on behalf of the defence and he states that he found it impossible to prepare the case for the defence in the absence of the papers, copies of which had been applied for on 7th November. He however, attended the jail on the 12th morning and he has made a grievance of the fact that he remained for some time outside the gate and then for about forty-five minutes between the two gates before he could enter the room inside the jail where the enquiry was to be held. I may mention here that under the orders of the District Magistrate all enquiries and trials held by Magistrates in cases arising out of the communal disturbances were to be held inside the jail.

[13] Mr. Pandey has made a further grievance of the fact that in the room where the enquiry was to be held, the arrangement was that there were three chairs, one for the learned Magistrate, another for the Court Inspector and a third for the Reader with a table between them. There was no chair and no table for the use of the lawyers for the accused. There were, I was told, at two ends of the room running along the walls raised platforms which were meant for the use of the members of the Bar and any member of the public who may happen to have been admitted into that room. A point is made of this arrangement also, and it is urged that not only it is humiliating that the members of the Bar should be treated in the manner mentioned above but also that it is impossible to expect that they would be able to do their duty under those conditions and in such an atmosphere.

[14] On 12th November when Mr. Pandey appeared he again filed an application for adjournment, and one of the points raised by him was that though he had applied for copies of the relevant papers as far back as 7th November, the copies had not till that date been issued. It is said that the Prosecuting Inspector at this stage produced the papers from his own custody and filed them before the Magistrate. The Magistrate thereupon insisted that as the papers were there, learned counsel may look at them and cross-examine the witnesses. He further agreed that he would record the evidence of formal witnesses on that date and that of material witnesses on succeeding dates and that he would examine the Civil Surgeon on 15th November. Mr. Pandey objected to that procedure and further to the examination of the Civil Surgeon on 15th on the ground that the knife, with which the offence is said to have been committed, had been sent, on 11th November, to the Chemi-



cal Examiner and he wanted the report of the Chemical Examiner and also the knife to show it to the Civil Surgeon at the time of his cross-examination and to find out whether the injury of the nature mentioned could have been caused by that knife. The learned Magistrate refused the request for adjournment and then an application was filed under S. 526, Criminal P. C., for two weeks time to enable the accused to move the High Court to transfer the case to some other Court. The learned Magistrate then passed the following order:

"Every material document is on the record and copies of it can be given very soon. It is not necessary to possess the copies of the documents for the purposes of cross-examining all the accused (sic. witnesses) and I gave assurance that I will not take up the examination of the witnesses for whose cross-examination the copies of the documents will be necessary unless the counsel of the accused gets the copies. In spite of this the application which was typed and ready already has been moved. This is only another method of getting time. But since it is necessary to adjourn the case under S. 526 I will adjourn it for two weeks provided that bond for Rs. 200 is executed as laid down in S. 526, clause 8."

[15] The bonds were executed and the case was adjourned to 26th November. The accused then moved the learned District Magistrate for the transfer of the case. The learned District Magistrate rejected the transfer application by an order dated November 19th. While dealing with this application the learned Magistrate observed:

"The only real question is whether the proceedings are being conducted in such a manner that the case of the accused is prejudiced or that they have valid grounds to apprehend an unfair trial. In the first place there are standing orders that all cases of communal character are to be tried within the jail premises, partly because police escorts are not available and secondly because it is not desirable in view of the present tension that incidents of communal character should be related in open Court."

He further mentioned that the proceedings before the Magistrate were merely of the nature of a preliminary enquiry and pointed out that the Magistrate had recently been posted to this district and there could, therefore, be no question of his being prejudiced against the accused.

[16] An application for transfer was then moved in this Court under S. 526, Criminal P. C. on 22-11-1946. The main grounds on which the transfer is sought are that the manner in which the enquiry is being conducted is bound to prejudice the case of the accused. The contentions are that the enquiry on the 8th should not have been started without giving previous notice to the accused so that they may have proper legal aid and they should not have been forced to enter on their defence without any legal assistance. The second ground is that it was impossible for the members of the Bar to do justice to the case in the surroundings in which they were placed. The next ground is that the accused

had a right to an open enquiry in a Court and not an enquiry in camera inside the jail where the public had no right to enter. As against the learned Magistrate it is urged that the learned Magistrate was not justified in recording the examination-in-chief in the absence of defence counsel, that the statements were not properly recorded, that the copies of the documents had not been given to the accused and that it was not possible, therefore, for the lawyers appearing for the accused to cross-examine the witnesses properly. That although the material exhibits were sent to the Chemical Examiner on 11th November and the report was not likely to be received before the 15th, the Magistrate was in a great hurry to finish the case and insisted on fixing 15th November for the examination of the Civil Surgeon and remarked that he wanted to finish the enquiry by the 16th.

[17] These are some of the main grounds on which the transfer is sought from the Court of Mr. Zaidi to the Court of some other Magistrate of competent jurisdiction.

[18] As regards the first point we have the provisions of S. 340, Criminal P. C. under which "any person accused of an offence before a criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader." There can be no doubt that the proceedings under chap. 18, are in the nature of judicial proceedings in a criminal Court and the applicants were persons who were accused of an offence and they were entitled, as a matter of right, to be defended by a pleader. The learned Magistrate was, therefore, bound to give to the accused sufficient facility to be represented by a lawyer, specially as they were in custody from the time that they had been arrested and accused of the offence. In 50 Bom. 741<sup>1</sup> Fawcett J. held that S. 340, Criminal P. C.,

"not only contemplates that the accused should be at liberty to be defended by a pleader at the time the proceedings are actually going on, but also implies that he should have a reasonable opportunity, if in custody, of getting into communication with his legal adviser for the purpose of preparing his defence." and Madgavkar J. observed:

"If the end of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case and to lay its evidence fully, freely, and fairly, before the Court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it is made with the aid of skilled legal advice so valuable that in the gravest of criminal trials, when life or death hangs in the balance, the very State, which undertakes the prosecution of the prisoner, also provides him, if poor, with such legal assistance."

[19] I am satisfied, from the explanation given by the learned Magistrate, that he was not inspired by any unfair motive, but he did, to my



mind, show far too much haste. The learned Magistrate did not apparently realise the importance from the point of view of the accused, of the recording of the examination-in-chief of the witnesses for the prosecution. I have already said that I have not examined the evidence of the witnesses for I consider that it would be improper at this stage to go into the question whether the evidence was properly recorded, but, to my mind, the examination-in-chief and the manner in which the evidence is recorded are just as important, at times more so, as the cross-examination, and the learned Magistrate erred in deciding to record the examination-in-chief of the witnesses without giving an opportunity to the accused to get adequate legal assistance. *See A. I. R. 1925 Mad. 1153.*<sup>2</sup> The accused had been arrested on the 5th and had been kept in custody ever since. They had not been informed that the enquiry would begin on the 8th. Their application for copies of various documents which would be necessary for any lawyer to go through and consider before he is able to assist the accused in a proper defence had not been obtained. (granted?) On the 8th the Magistrate recorded the evidence of the most important witnesses for the prosecution when there was no lawyer who had been engaged to look after the interest of the accused. In a similar case before Mackney J. in *A. I. R. 1938 Rang. 198*<sup>3</sup> the learned Judge observed :

"The Magistrate apparently did not realise that a pleader defending a person has to do more than go through the record. He has to go through all the prosecution evidence, find out what defence may best be set up and what means there exist for putting up that defence. It seems to me that in a case of this nature certainly more than a day would be required for even the most skilful and able lawyer in order to decide this matter."

[20] The learned Magistrate, if he had any experience at the Bar, would not have considered it enough that on 12th November the Prosecuting Inspector had taken the relevant papers out of his pocket and had put them on the record. He would have realised that it was necessary for Mr. Pandey to study those documents, question his clients and get other information before he could be ready to cross-examine the witnesses. The same learned Judge in the same case observed :

"It is not only the State which is to be considered in these matters; it is the administration of justice. Even if considerable expense is incurred by the State in the proper administration of justice yet that expense must be incurred and injustice must not be perpetrated simply because justice is expensive."

[21] On that sole ground the learned Judge, who belonged to the Indian Civil Service and must, therefore, have had considerable experience of criminal work, transferred the case from the Court of the Magistrate. I would have followed

the decision quoted by me above and transferred the case on that sole ground, but in this case I regret to say there are some other grounds which I consider equally important.

[22] I cannot lightly brush aside the complaint that was made to me, while I was receiving applications, by more than one senior counsel, practising in this Court, of the treatment that they had received while they were engaged to do their duty in defending their clients. Every one of them complained that there was inordinate amount of delay outside the jail and inside the jail; the learned Magistrate failed to realise that he must, as far as possible, try to reproduce the atmosphere of a Court room. The learned Magistrate may have been compelled to hold his enquiry inside the jail by reason of the standing order mentioned by the District Magistrate in his order rejecting the application for transfer. I can find no provision in the Criminal Procedure Code which compels a Magistrate to hold his Court in the usual Court room. Section 352, Cr. P. C., probably contemplates that a Magistrate can hold his Court anywhere he likes. The standing order cannot bind the learned Magistrate in his judicial capacity, but as both the executive and the judicial functions are not separated, the executive order directing the Magistrate to hold his Court inside the Jail is probably binding on him. But the learned Magistrate, wherever he may be compelled to sit by executive orders, is bound by the provisions of S. 352, Cr. P. C., and he must realise that the place where the trial is held must be something like an open Court to which the public generally may have access so far as the same can conveniently contain them. The discretion to exclude the public generally or any particular person at any stage of any enquiry or trial must be a judicial discretion exercised by him. I am laying emphasis on this point because, to my mind, if the Magistrate is compelled to hold a trial in jail, then the jail must become something like an open Court where any member of the public may have a right of access, if the room in which the trial is being held can conveniently contain him and unless the learned Magistrate, for reasons which he must, to my mind, record, decides to exclude the public or any particular person. In a jail the Magistrate must himself be subject to the jail rules and subject to the authority of the officer in charge of the jail, and though in theory, if the public is given free access, I can see no objection to a trial being held in jail, in practice I do not think it is possible, unless the jail rules make provision for such enquiries or trials in jail when any member of the public may have a right to attend.



[23] In A. I. R. 1917 Lah. 311<sup>4</sup> where the trial was held in jail, it was argued that it was vitiated on that account. The learned Judge observed: "There is nothing to show that admittance was refused to any one who desired it or that the prisoners were unable to communicate with their friends, or counsel. No doubt it is difficult to get counsel to appear in the jail and for that reason if for no other such trials are usually undesirable, but in this case the executive authorities were of the opinion that it would be unsafe to hold the trial elsewhere."

I am, however, of the opinion, with great respect to the learned Judge, that it is not necessary for the accused to prove that any person who actually desired admittance was refused. It is for the prosecution to satisfy the Court that any person who desired to attend could do so and there was no prohibition against his admittance.

[24] It is well established in England that every Court of justice is open to every subject of the King and that a right to an open trial is one of the cherished rights of the subject. It is not necessary for me to give a historical survey of how the right has grown, but the point has now been settled by a decision of the House of Lords in 1913 A. C. 417<sup>5</sup> where it was emphasised that even in a case where the parties had agreed that a case may be heard in camera, a Judge would have no right to exclude the public, except in some special class of cases, unless the parties agreed to appoint him an arbitrator and to hear the case as such. Those special cases are: wardship and relation between the guardian and ward, and secondly the care and treatment of lunatics. A third ground was mentioned by Viscount Haldane, L. C., that if it was strictly necessary for the attainment of justice and the Court was satisfied that by nothing short of the exclusion of the public it is possible to do justice, can a Judge decide to sit in camera. Even this ground was not accepted by the Earl of Halsbury who thought that this would be leaving the matter too much to the discretion of individual Judges, who might think that in their view the paramount object of the administration of justice could not be attained without a secret hearing. It is not necessary for me to go into this question further as, unlike the law in England, the Criminal Procedure Code in India gives a Criminal Court a right to exclude the public generally or any particular person, but this being an exception to a very well settled rule, to my mind, the Magistrate must record his reasons for doing so if he decides to exclude either the public or a section of the public; and it must be understood that it is a matter within the judicial discretion of the Magistrate himself and not a matter about which he can be controlled by executive orders.

[25] Though, therefore, I am of the opinion that it was not illegal for the learned Magistrate

to hold the enquiry in jail or anywhere else, the learned Magistrate must realise that the place where the enquiry is held must be deemed to be an open Court where the public as such have a right to attend and that such right may be controlled in a proper case on special grounds by the Court and not by the jail rules or by the officer in charge of the jail. If the Magistrate cannot have the absolute right to regulate the proceedings at the place where he is holding the trial, he ought not to hold the trial or the enquiry at such a place.

[26] I consider it a matter of equal importance that though a Magistrate may hold his enquiry anywhere, he owes a duty to see that proper facilities are given to the members of the Bar. No lawyer can do his duty to his client, nor can a Magistrate discharge his duties as such, in a room where the Magistrate sits in one corner with the Prosecuting Inspector on one side and the Reader on the other, all the three of them having chairs, with members of the Bar standing in front as suppliants for his favours. I want to make it perfectly clear that, in my judgment, it is impossible to administer justice properly without legal aid, and in that sense the members of the Bar probably do as important a work as Judges themselves and, therefore, for the proper administration of justice it is necessary that the members of the Bar should get adequate facilities and proper treatment. No accused can have confidence in a Magistrate who treats his counsel in the manner in which Mr. A. P. Pandey was treated, and I am surprised that any Magistrate should have the discourtesy to keep a member of the Bar standing in his Court while he allows a chair to the Prosecuting Inspector and to his Reader. I do not want to say anything further on this point as the learned Government Advocate has assured me that such incidents would not occur in future. I hope incidents like this would not again come to the notice of this Court and the Magistrates would realise that just as the members of the Bar owe a duty to show proper respect to the Bench, the Bench has an equal duty to be courteous and considerate to the Bar.

[27] Having, therefore, carefully considered this matter, I am of the opinion that there was enough ground for apprehension in the mind of the accused that they would not receive a fair trial in the Court of the learned Magistrate. I, therefore, direct that the case be transferred from the Court of Mr. J. H. Zaidi, Magistrate, First Class, to some other Court of competent jurisdiction.

D.S.

*Application granted.*

Acc. No. ... 177.285...

Dated 25.11.1920

END



Title

Author

Accession No.

Call No.

Borrower's  
No.

Issue  
Date

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No.

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